

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

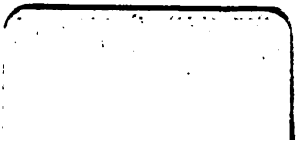
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`







THE

AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. LII.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING REPORTS:

76 ALABAMA; 65 CALIFORNIA; 52 CONNECTICUT; 102 INDIANA; 64 IOWA; 33 KANSAS; 14 LEA; 77 MAINE; 63 MARYLAND; 138 MASSACHUSETTS; 139 MASSACHUSETTS; 54 MICHIGAN; 62 MISSISSIPPI; 82 MISSOURI; 17 NEBRASKA; 99 NEW YORK; 41 OHIO STATE; 107 PENNSYLVANIA STATE; 57 VERMONT; 79 VIRGINIA; 25 WEST VIRGINIA.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1886.

121692

JUL 29 1942

Entered, according to act of Congress, in the year eighteen hundred and eighty-six,
By JOHN D. PARSONS, Jr.,
In the office of the Librarian of Congress, at Washington.

ELECTROTYPED AND PRINTED BY
WEED, PARSONS AND COMPANY,
ALBANY, N. Y.

VANDERBILT UNIV.

SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parenthesis, and the volumes of American Reports in heavy letter.

Alabama (44) **4**; (45) **6**; (46) **7**; (47) **11**; (48) **17**; (49, 50) **20**; (51, 52) **23**; (53, 54) **25**; (55, 56) **28**; (58) **29**; (59, 60) **31**; (61) **32**; (62) **34**; (63) **35**; (64) **38**; (65) **39**; (66) **41**; (67) **42**; (68, 69) **44**; (71) **46**; (72) **47**; (73, 74) **49**; (75) **51**; (76) **52**.

Arkansas (25) **4**; (26) **7**; (27) **11**; (28) **18**; (29, 30) **21**; (31) **25**; (32) **29**; (33) **34**; (34) **36**; (35) **37**; (36) **38**; (37) **40**; (38) **42**; (39) **43**; (40, **41**, 42) **48**; (43, 44) **51**.

Baxter (Tenn.) (1) **25**; (2) no cases; (3, 4) **27**; (5) **30**; (6, 7) **32**; (8) **35**; (9) **40**.

Bush (Ky.) (7) **3**; (8) **8**; (9) **15**; (10) **19**; (11) **21**; (12) **23**; (13) **26**; (14) **29**.

California (39) **2**; (40) **6**; (41, 42) **10**; (43, 44, 45, 46) **13**; (47, 48) **17**; (49, 50) **19**; (51) **21**; (52) **28**; (53) **31**; (54) **35**; (55) **36**; (56) **38**; (57) **40**; (58) **41**; (59) **43**; (60, 61) **44**; (62) **45**; (63, 64) **49**; (65) **52**.

Colorado (1) **9**; (2, 3) **25**; (4) **34**; (5) **40**; (6) **45**; (7) **49**.

Connecticut (36) **4**; (37, 38) **9**; (39) **12**; (40) **16**; (41, 42) **19**; (43) **21**; (44) **26**; (45) **29**; (46) **33**; (47) **36**; (48) **40**; (49) **44**; (50) **47**; (51) **50**; (52) **52**.

Florida (13) **7**; (14) **14**; (15) **21**; (16) **26**; (17) **35**; (18) **43**; (19) **45**; (20) **51**.

Georgia (40) **2**; (41, 42) **5**; (43, 44) **9**; (45, 46) **12**; (47, 48, 49, 50) **15**; (51, 52, 53, 54, 55, 56) **21**; (57, 58) **24**; (59, 60) **27**; (61) **34**; (62) **35**; (63) **36**; (64) **37**; (65) **38**; (66) **42**; (67) **44**; (68) **45**; (69) **47**; (70) **48**; (71) **51**.

Grattan (Va.) (20) **3**; (21) **8**; (22) **12**; (23) **14**; (24, 25) **18**; (26, 27) **21**; (28, 29) **26**; (31) **31**; (30) **32**; (32) **34**; (33) **36**.

Heiskell (Tenn.) (1) **2**; (2) **5**; (3) **8**; (4, 5) **13**; (6, 7) **19**; (8, 9) **24**; (10, 11, 12) **27**.

Houston (Del.) (3) **11**; (4) **15**.

Illinois (51) **2**; (52) **4**; (53, 54) **5**; (55, 56) **8**; (57, 58) **11**; (59, 60, 61, 62, 63) **14**; (64, 65, 66, 67) **16**; (68, 69) **18**; (75, 76, 77, 78) **20**; (70, 71, 72, 79, 80) **22**; (73, 74)* **24**; (81, 82, 83, 84) **25**; (85) **28**; (86, 87) **29**; (88) **30**; (89) **31**; (90) **32**; (91) **33**; (92, 93, 94) **34**; (95) **35**; (96) **36**; (97) **37**; (98) **38**; (99, 100) **39**; (101, 102) **40**; (103) **42**; (104, 105) **44**; (106) **46**; (107) **47**; (108) **48**; (109) **50**; (110) **51**.

Indiana (32) **2**; (33) **5**; (34) **7**; (35) **9**; (36, 37, 38) **10**; (39, 40, 41, 42, 43) **13**; (44, 45, 46) **15**; (47, 48) **17**; (49, 50, 51) **19**; (52, 53) **21**; (54, 55) **23**; (56, 57, 58, 59) **26**; (60, 61) **28**; (62, 63) **30**; (64) **31**; (65, 66) **32**; (67) **33**; (68) **34**; (69) **35**; (70, 71) **36**; (72) **37**; (73) **38**; (74, 75) **39**; (76, 77) **40**; (78, 79, 80) **41**; (81, 82) **42**; (83, 84) **43**; (85, 86, 87) **44**; (88) **45**; (89, 90, 91) **46**; (92, 93) **47**; (94, 95) **48**; (96, 97, 98) **49**; (99, 100) **50**; (101) **51**; (102) **52**.

*The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 75th were published after the 75th and three succeeding volumes.

Iowa (27) **1**; (28, 29) **4**; (30) **6**; (31, 32) **7**; (33, 34) **11**; (35, 36) **14**; (37, 38, 39) **18**; (40, 41, 42) **20**; (43) **22**; (44, 45) **24**; (46) **26**; (47) **29**; (48) **30**; (49) **31**; (50) **32**; (51) **33**; (52) **35**; (53) **36**; (54) **37**; (55) **39**; (56) **41**; (57) **42**; (58) **43**; (59) **44**; (60) **46**; (61) **47**; (62) **49**; (63) **50**; (64) **52**.

Kansas (5, 6) **7**; (7, 8, 9) **12**; (10, 11, 12) **15**; (13, 14) **19**; (15, 16, 17) **22**; (18) **26**; (19, 20) **27**; (21) **30**; (22) **31**; (23) **33**; (24) **36**; (25) **37**; (26) **40**; (27) **41**; (28) **42**; (29) **44**; (30) **46**; (31) **47**; (32) **49**; (33) **52**.

Kentucky (78) **39**; (79) **42**; (80) **44**; (81) **50**.

Lea (Tenn.) (1) **27**; (2, 3 **31**; (4, 5, 6, 7) **40**; (8) **41**; (9) **42**; (10) **43**; (11, 12) **47**; (13) **49**; (14) **52**.

Louisiana (22) **2**; (23) **8**; (24, 25) **18**; (26, 27) **21**; (28) **26**; (29) **29**; (30) **31**; (31) **33**; (32) **36**; (33), **39**; (34) **44**; (35) **48**; (36) **51**.

MacArthur (District of Columbia) (1, 2) **29**; (3) **36**.

Mackey (District of Columbia) (1, 2) **47**; (3) **51**.

MacArthur and Mackey (District of Columbia) **48**.

Maine (57) **2**; (58) **4**; (59) **8**; (60) **11**; (61) **14**; (62) **16**; (63, 64) **18**; (65) **20**; (66) **22**; (67) **24**; (68) **28**; (69) **31**; (70) **35**; (71) **36**; (72) **39**; (73) **40**; (74) **43**; (75) **46**; (76) **49**; (77) **52**.

Maryland (31) **1**; (32, 33) **3**; (34, 35) **6**; (36, 37) **11**; (38, 39, 40) **17**; (41, 42, 43) **20**; (44) **22**; (45, 46) **24**; (47) **28**; (48) **30**; (49, 50) **33**; (51) **34**; (52, 53) **36**; (54, 55) **39**; (56, 57) **40**; (58) **42**; (59) **43**; (60) **45**; (61) **48**; (62) **50**; (63) **52**.

Massachusetts (100) **1**; (101, 102) **3**; (103) **4**; (104) **6**; (105) **7**; (106) **8**; (107) **9**; (108) **11**; (109) **12**; (110) **14**; (111, 115) **15**; (112, 116) **17**; (113) **18**; (114, 117, 118) **19**; (119) **20**; (120) **21**; (121, 122) **23**; (123) **25**; (124) **26**; (125) **28**; (126) **30**; (127) **34**; (128) **35**; (129) **37**; (130) **39**; (131) **41**; (132) **42**; (133) **43**; (134) **45**; (135) **46**; (136) **49**; (137) **50**; (138, 139) **52**.

Michigan (19) **2**; (20, 21) **4**; (22) **7**; (23, 24) **9**; (25, 26) **12**; (27, 28) **15**; (29, 30, 31) **18**; (32, 33) **20**; (34) **22**; (35, 36) **24**; (37) **26**; (40) **29**; (38) **31**; (41) **32**; (39) **33**; (42) **36**; (43, 44) **38**; (45) **40**; (46, 47) **41**; (48) **42**; (49) **43**; (50) **45**; (51) **47**; (52) **50**; (53) **51**; (54) **52**.

Minnesota (15) **2**; (16, 17, 18) **10**; (19, 20, 21) **18**; (22) **21**; (23) **23**; (24) **31**; (25) **33**; (26) **37**; (27) **38**; (28) **41**; (29) **43**; (30) **44**; (31) **47**; (32) **50**.

Mississippi (42) **2**; (43) **5**; (44, 45) **7**; (46, 47, 48) **12**; (49, 50) **19**; (51, 52, 53) **24**; (54) **28**; (55) **30**; (56) **31**; (57) **34**; (58) **38**; (59) **42**; (60) **45**; (61) **48**; (62) **52**.

Missouri (46) **2**; (47) **4**; (48, 49) **8**; (50, 51) **11**; (52, 53, 54) **14**; (55, 56, 57, 58) **17**; (59, 60, 61, 62, 63) **21**; (64, 65, 66) **27**; (67) **29**; (68) **30**; (69) **33**; (70) **35**; (71) **36**; (72) **37**; (73) **39**; (74) **41**; (75) **42**; (76) **43**; (77) **46**; (78) **47**; (79) **49**; (80) **50**; (81) **51**; (82) **52**.

Montana (1, 2) **25**; (3) **35**; (4) **47**; (5) **51**.

Nebraska (3, 4) **19**; (5) **25**; (6, 7) **29**; (8) **30**; (9) **31**; (10) **35**; (11) **38**; (12) **41**; (13) **42**; (14) **45**; (15) **48**; (16) **49**; (17) **52**.

Nevada (6) **3**; (7) **8**; (9) **16**; (10, 11) **21**; (12) **28**; (13) **29**; (14) **33**; (15) **37**; (16) **40**; (17) **45**; (18) **51**.

New Hampshire (48) **2**; (49) **6**; (50) **9**; (51) **12**; (52) **13**; (53) **16**; (54, 55) **20**; (56) **22**; (57) **24**; (58) **42**; (59) **47**; (60) **49**.

New Jersey (34) **3**; (35) **10**; (36) **13**; (37) **18**; (38) **20**; (39) **23**; (40) **29**; (41) **32**; (42) **36**; (43) **39**; (44) **43**; (45) **46**; (46) **50**.

New Jersey Equity (33) **36**; (34) **38**; (35) **40**; (37) **45**; (38) **48**; (39) **51**.

New York (41, 42) **1**; (43) **3**; (44) **4**; (45) **6**; (46, 47) **7**; (48) **8**; (49, 50, 51) **10**; (52) **11**; (53, 54) **13**; (55) **14**; (56, 57) **15**; (58, 59) **17**; (60, 61) **19**; (62, 63) **20**; (64) **21**; (65) **22**; (66, 67, 68) **23**; (69) **25**; (70) **26**; (71) **27**; (72) **28**; (73) **29**; (74) **30**; (75) **31**; (76) **32**; (77) **33**.

(78) **34**; (79) **35**; (80) **36**; (81, 82) **37**; (83, 84) **38**; (85) **39**; (86) **40**; (87) **41**; (88, 89) **42**; (90, 91) **43**; (92) **44**; 93) **45**; (94) **46**; (95) **47**; (96) **48**; (97) **49**; (98) **50**; (99) **52**.

North Carolina (65) **6**; (66) **8**; (67, 68, 69) **12**; (70) **16**; (71) **17**; (72, 73, 74) **21**; (75, 76) **22**; (77, 78) **24**; (79) **28**; (80) **30**; (81) **31**; (82) **33**; (83) **35**; (84) **37**; (85) **39**; (86) **41**; (87) **42**; (88) **43**; (89) **45**; (90) **47**; (91) **49**.

Ohio (19) **2**; (20) **5**; (21) **8**; (22) **10**; (23) **13**; (24) **15**; (25) **18**; (26) **20**; (27, 28) **22**; (29) **23**; (30, 31) **27**; (32) **30**; (33) **31**; (34) **32**; (35) **35**; (36) **38**; (37) **41**; (38) **43**; (39, 40) **48**; (42) **51**; (41) **52**.

Oregon (3) **8**; (4) **18**; (5) **20**; (6) **25**; (7) **33**; (8) **34**; (9) **42**; (10) **45**; (11) **50**.

Pennsylvania (62) **1**; (63, 64, 65) **3**; (66, 67) **5**; (68, 69) **8**; (70, 71) **10**; (72, 73) **13**; (74, 75) **15**; (76, 77) **18**; (78, 79, 80) **21**; (81, 82) **22**; (83, 84) **24**; (85, 86) **27**; (87) **30**; (88) **32**; (89) **33**; (90) **35**; (91) **36**; (92) **37**; (93, 94, 97) **39**; (95) **40**; (96, 98) **42**; (99) **44**; (100) **45**; (101) **47**; (102) **48**; (103, **104**) **49**; (105, 106) **51**; (107) **52**.

Rhode Island (8) **5**; (9) **11**; (10) **14**; (11) **23**; (12) **34**; (13) **43**; (14) **51**.

South Carolina (1 N. S.) **7**; (2, 3, 4) **16**; (5) **22**; (6, 7) **24**; (8) **28**; (9, 10) **30**; (11, 12) **32**; (13) **36**; (14) **37**; (15) **40**; (16) **42**; (17) **43**; (18) **44**; (19) **45**; (20) **47**.

Texas (32) **5**; (33, 34) **7**; (35, 36, 37) **14**; (38, 39, 40, 41, 42) **19**; (43, 44, 45) **23**; (46, 47, 48) **26**; (49) **30**; (50, 51) **32**; (52) **36**; (53) **37**; (54) **38**; (55) **40**; (56) **42**; (57, 58) **44**; (59) **46**; (60, 61) **48**; (62) **50**; (63) **51**.

Texas Ct. App. (1, 2) **28**; (3, 4) **30**; (5, 6, 7) **32**; (8) **34**; (9) **35**; (10) **38**; (11) **40**; (12) **41**; (13) **44**; (14) **46**; (15, 16) **49**; (17) **50**; (18) **51**.

Vermont (42) **1**; (43) **5**; (44) **8**; (45) **12**; (46) **14**; (47) **19**; (48) **21**; (49) **24**; (50) **28**; (51) **31**; (52) **36**; (53) **38**; (54) **41**; (55) **45**; (56) **48**; (57) **52**.

Virginia (75) **40**; (76) **44**; (77) 46; (78) **49**; (79) **52**.

Washington (1) **34**.

West Virginia (4) **6**: (5) **13**; (6) **20**; (7, 8) **23**; (9, 10, 11) **27**; (12) **29**; (13) **31**; (14) **35**; (15) **36**; (16) **37**; (17, 18) **41**; (19) **42** (20) **43**; (21) **45**; (22) **46**; (23) **48**; (24) **49**; (25) **52**.

Wisconsin (24) **1**; (25) **3**; (26) **7**; (27, 28, 29) **9**; (30, 31) **11**; (32, 33) **14**, (34, 35, 36) **17**; (37) **19**; (38, 39) **20**; (40, 41) **22**; (42) **24**; (43, 44) **28**; (45) **30**; (46, 47) **32**; (48) **33**; (49) **35**; (50) **36**; (51) **37**; (52) **38**; (53) **40**; (54) **41**; (55) **42**; (56) **43**; (57, 58) **46**; (59) **48**; (60, 61) **50**; (62) **51**.

LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

ALABAMA.

GEORGE W. STONE, Chief Justice.
H. M. SOMERVILLE,
DAVID CLOPTON.

CALIFORNIA.

R. F. MORRISON, Chief Justice.
E. W. McKINSTRY,
S. B. McKEE,
E. M. ROSS,
J. D. THORNTON,
M. H. MYRICK,
J. R. SHARPSTEIN.

CONNECTICUT.

JOHN DUANE PARK, Chief Justice.
ELISHA CARPENTER,
DWIGHT WHITEFIELD PARDEE,
DWIGHT LOOMIS,
MILES TOBEY GRANGER.

INDIANA.

ALLEN ZOLLARS, Chief Justice. *
JOSEPH A. S. MITCHELL, Chief Justice. †
WILLIAM E. NIBLACK,
GEORGE V. HOWK,
BYRON K. ELLIOTT.

* November term, 1884. † May term, 1885.

IOWA.

JOSEPH R. REED, Chief Justice.
JOSEPH M. BECK,
AUSTIN ADAMS,
WILLIAM H. SEEVERS,
JAMES H. ROTHROCK.

KANSAS.

ALBERT H. HORTON, Chief Justice.
DANIEL M. VALENTINE,
WM. A. JOHNSTON.

MAINE.

JOHN A. PETERS, Chief Justice.
CHARLES W. WALTON,
CHARLES DANFORTH,
WILLIAM WIRT VIRGIN,
ARTEMAS LIBBEY,
LUCILIUS A. EMERY,
ENOCH FOSTER,
THOMAS H. HASKELL.

MARYLAND.

RICHARD HENRY ALVEY, Chief Judge.
LEVIN THOMAS HANDY IRVING,
JOHN MITCHELL ROBINSON,
GEORGE YELLOTT,
OLIVER MILLER,
JOHN RITCHIE,
FREDERICK STONE,
WILLIAM SHEPARD BRYAN.

MASSACHUSETTS.

MARCUS MORTON, Chief Justice.
WALBRIDGE A. FIELD,
CHARLES DEVENS,
WILLIAM ALLEN,
CHARLES ALLEN,
WALDO COLBURN,
OLIVER WENDELL HOLMES, Jr.

MICHIGAN.

THOMAS M. COOLEY, Chief Justice.
JAMES V. CAMPBELL,
THOMAS R. SHERWOOD,
JOHN W. CHAMPLIN.

MISSISSIPPI.

J. A. P. CAMPBELL, Chief Justice.
T. E. COOPER, Chief Justice.
H. H. CHALMERS,
J. M. ARNOLD.

MISSOURI.

WARWICK HOUGH, Chief Justice.
JOHN W. HENRY,
ELIJAH H. NORTON,
ROBERT D. RAY,
THOMAS A. SHERWOOD,
JOHN F. PHILIPS,
ALEXANDER MARTIN,
H. CLAY EWING.

NEBRASKA.

AMASA COBB, Chief Justice.
SAMUEL MAXWELL,
M. B. REESE.

NEW YORK.

WILLIAM C. RUGER, Chief Judge.
CHARLES ANDREWS,
CHARLES A. RAPALLO,
THEODORE MILLER,
ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH.

OHIO.

SUPREME COURT COMMISSION.

MOSES M. GRANGER, Chief Judge.
GEORGE K. NASH,
FRANKLIN J. DICKMAN,
CHARLES D. MARTIN,
JOHN McCAULEY.

PENNSYLVANIA.

ULYSSES MERCUR, Chief Justice.
ISAAC G. GORDON,
EDWARD M. PAXSON,
JOHN TRUNKEY,
JAMES P. STERRETT,
HENRY GREEN,
SILAS M. CLARK.

TENNESSEE.

JAMES W. DEADERICK, Chief Justice.
PETER TURNEY,
J. B. COOKE,
WILLIAM F. COOPER,
THOMAS J. FREEMAN.

VERMONT.

HOMER E. ROYCE, Chief Justice.
TIMOTHY P. REDFIELD,
JONATHAN ROSS,
H. HENRY POWERS,
WHEELOCK G. VEAZEY,
RUSSELL S. TAFT,
JOHN W. ROWELL,
WILLIAM H. WALKER.

VIRGINIA.

LUNSFORD L. LEWIS, President.
BENJAMIN W. LACY,
THOMAS T. FAUNTLEROY,
ROBERT A. RICHARDSON,
DRURY A. HINTON.

WEST VIRGINIA.

OKEY JOHNSON, President.
THOMAS C. GREEN,
ADAM C. SNYDER,
SAMUEL WOODS.

INDEX OF PAGES

AT WHICH THE DIFFERENT STATE REPORTS MAY BE FOUND.

	PAGE.
ALABAMA	314–360
CALIFORNIA	295–313
CONNECTICUT	552–615
INDIANA	645–697
IOWA	431–467
KANSAS	523–551
MAINE	739–789
MARYLAND	495–522
MASSACHUSETTS	242–294, 698–738
MICHIGAN	790–839
MISSISSIPPI	181–210
MISSOURI	361–397
NEBRASKA	398–430
NEW YORK	1–66
OHIO	67–112
PENNSYLVANIA	468–494
TENNESSEE	149–180
VERMONT	113–148
VIRGINIA	616–644
WEST VIRGINIA	211–241

TABLE OF CASES REPORTED.

PAGE.

Abbett ads. Quarl 662
Ables ads. Moring 186
Adams v. Marshall 271
Ætna Life Ins. Co. ads. Westover 1
Allegheny, City of, v. Campbell 478
Allen ads. Mutual Life Ins Co 245
American Ex. Co. ads. Mather 256
Anderson ads. Howand 529
Andrews ads. Carthage Turnpike Co... 653
Applegate ads. Douthitt 533
Ashby ads. Richmond, etc. R. Co..... 620
Atchison, etc., R. Co. v. Weber 543
Atwood ads. Graves 610
Avery v. Avery 523
Avery v. Dougherty 660

Bailey v. Troy & Boston Railroad Co ... 129
Baker's Appeal 478
Bank v. Butler 94
Bank of Cass County v. Morrison 417
Barber ads. Welch 597
Barnes v. Chicopee 259
Barrett v. Bell 361
Baxter v. Moses 783
Baxter Nat. Bank ads. Langdon 113
Beard v. Beard 219
Becklenheimer ads. Fountain, etc., Coal, etc., Co 645
Beerman ads. Hogg 71
Bell ads. Barrett 361
Bellows v. Sowles 118
Bills ads. Rinehart 385
Birdsell v. Birdzell 589
Bishop v. Weber 715
Board, etc. ads. Clark 596
Boisseau v. Boisseau 616
Boston ads. Cavanagh 116
Boston & Albany Railroad ads. Leary.. 733
Boston, etc., R. Co. ads. O'Brien 279
Bowen v. Detroit City Railway 822
Bowman ads. Smith Bridge Co 67
Boyd v. Conklin 831
Boylston Mutual Ins. Co. ads. Jackson Co 728
Brechbill v. Randall 695
Bridgeport Savings Bank ads. Burton.. 602
Brigg v. Hilton 63

PAGE.

Brill v. Sugar Manuf. Co 74
Brinker ads. Leinkauf 183
Bronson v. Oberlin 90
Brown v. Brown 169
Brown ads. Campbell 446
Brown v. County Treasurer 800
Brumfiel ads. Vigo Agricultural Soc'ty, 657
Bryant ads. Security Company 599
Buckingham v. Elliott 186
Burgess ads. Davis 828
Burlington, Town of, v. Schwarzman ..571
Burns v. Moore 332
Burton v. Bridgeport Savings Bank ... 602
Butler ads. Bank 94

Campbell v. Brown 446
Campbell ads. City of Allegheny 478
Carr ads. Central Banking Co 339
Carthage Turnpike Co. v. Andrews ... 653
Cassidy ads. Cole 284
Cavanagh v. Boston 716
Central, etc., Banking Co. v. Carr 339
Central Railroad, etc., Co. v. Lampley, 334
Central Railroad & Banking Co. v. Smith 353
Chambers ads. Whitney 398
Chancey v. Smith 217
Chase v. Maine Central R. Co 744
Chesterville, Inhab. of, ads. Inhab. of Fayette 741
Chicago, etc., R. Co. ads. Dickson ... 460
Chicago, etc., R. Co. ads. Way 431
Chicopee ads. Barnes 259
Clark v. Board of Commissioners of Montgomery county 536
Cole v. Cassidy 284
Collins' Appeal 479
Collins v. Foley 505
Commonwealth ads. Harrison 624
Commonwealth ads. Louthan 626
Commonwealth v. Pierce 264
Conant, Matter of 759
Conklin ads. Boyd 831
Conly ads. White 154
Conrad v. Saginaw Mining Co 817
Continental Life Ins. Co. ads. Currier. 134

	PAGE.
Cook ads. McGinnis	115
Cottle v. Spitzer	305
County Treasurer ads. Brown	300
Craigie v. Hadley	9
Crandall v. Lincoln	560
Cross ads. Davis	177
Cunningham v. Evansville, etc., R. Co.	683
Currier v. Cont. Life Ins. Co	134
Curtis v. Portland Savings Bank	750
Darrigan v. New York, etc., R. Co	590
Davis v. Burgess	828
Davis v. Cross	177
Des Moines, etc., R. Co. ads. Morgan	462
Detroit City Railway ads, Bowen	832
Dietrich v. Northampton	242
Dixon v. Chicago, etc., R. Co	460
Dodd v. Witt	700
Dooley v. City of Kansas	380
Dougherty ads. Avery	680
Douthitt v. Applegate	533
Eames v. Savage	751
Eastern R. Co. ads. Merrill	705
Elliott ads. Buckingham	188
Engle v. Sohn	108
Equitable Life, etc., Society v. Vogel's Executrix	344
Equitable, etc., Benefit Union ads. White	325
Erie Preserving Company v. Miller	607
Evansville, etc., R. Co. ads. Cunningham	683
Fayette, Inh. of, v. Inhab. of Chesterville	741
Feineman v. Sacks	547
Feirath v. Schonfield	319
Fink ads. Iron Railroad Co	84
Fink v. Missouri Furnace Co	376
Flint, etc., R. Co. ads. Lewis	
Fogler, Matter of	759
Foley ads. Collins	505
Ford ads. Thomas	513
Foster v. Jones	637
Fountain Co., Coal, etc., Co. v. Beckleheimer	645
Fraer ads. Jackson	449
Friend v. Garcelon	739
Garcelon ads. Friend	739
Geist ads. Winlack	473
Gibson v. Seymour	688
Gilman v. McArdle	41
Graves v. Atwood	610
Hackett v. Hewitt	132
Hadley ads. Craigie	9
Hammond ads. Swann	255
Hannibal, etc., R. Co. ads. Limekiller	523
Harker v. Smith	80
Harmon v. Omaha	429
Harrison v. Commonwealth	634
Harveys ads Kyle	235
Hathaway v. State Insurance Co	436
Hawes ads. Mason	553
Hawks v. Locke	702
Health Department v. Purdon	22
Hegerich v. Keddie	25
Heighe v. Littig	510
Helmetag's Admr. v. Miller	316
Hewitt ads. Hackett	132
Hickey v. Taafe	19
Higgins ads. Hotchkiss	583
Hillard v. New York, etc., Gas Coal Co.	99
Hilton ads. Brigg	68
Hinckley v. Thatcher	719
Hogg v. Beerman	71
Holcomb v. Town of Winchester	608
Hope v. Wilkinson	149
Hotchkiss v. Higgins	583
House of Refuge ads. Perry	495
Howard Ins. Co. ads. Mooney	277
Huffmann ads. South, etc., Railroad Co.	349
Humes v. Missouri Pacific R. Co	369
Humphrey ads. Loeser	86
Husted ads Mead	554
Innerarity v. Merchant's Nat. Bank	760
Iron Railroad Company v. Fink	84
Jackson Co. v. Boylston Mut. Ins. Co	726
Jackson v. Traer	449
Jacob ads. Visalia	303
Johnson v. Wilkinson	696
Jones ads. Foster	637
Judkins ads. Randlette	747
Kalamazoo Buggy Co. ads. Myers	811
Kansas, City of, ads. Dooley	380
Keddie ads. Hegerich	25
Keeler ads. People	49
Kirk ads. Pittsburgh, etc. R. Co	675
Knowles ads. Northrop	612
Kyle v. Harveys	235
Lampley ads. Central Railroad, etc. Co.	334
Langdon v. Baxter Nat. Bank	113
Lawrence ads. Lockwood	763
Leary v. Boston & Albany Railroad	733
Leinkauf v. Brinker	183
Lewis v. Flint, etc., R. Co	
Lewis v. Tilton	436
Limekiller v. Hannibal, etc., R. Co	523
Lincoln ads. Crandall	560
Lettig ads. Heighe	510
Locke ads. Hawks	702
Lockwood Co. v. Lawrence	763
Loeser v. Humphrey	86
Lothrop v. Thayer	286

	PAGE.
Louthan v. Commonwealth	636
Lowery v. Manhattan R. Co	12
Maine Central R. Co. ads. Chase	744
Majors ads. People	295
Manhattan Railway Co. ads. Lowery	12
Mannville Co. v. City of Worcester	261
Marshall ads. Adams	271
Martin ads. State	167
Marx ads. People	34
Mason v. Hawes	553
Mather v. Amer. Ex. Co	258
McArdle ads. Gilman	41
McCormick v. Penn. Central R. Co,	6
McGehee v. State	209
McGinnis v. Cook	115
McGowan ads. Vicksburg, etc. R. Co	205
McHenry ads. Stockwell	475
Mead v. Husted	554
Mellinger ads. Wetmore	465
Merchant's Nat. Bank ads. Innerarity	710
Merrill v. Eastern R. Co	705
Miller ads. Erie Preserving Company	607
Miller ads. Helmetag's Admr	316
Missouri Furnace Co. ads. Fink	376
Missouri Pacific R. Co. ads. Humes	369
Mitchell v. Morse	781
Monroe ads. Moore	444
Mooney v. Howard Ins. Co	277
Moore ads. Burns	332
Moore v. Monroe	444
Morgan v. DesMoines, etc. R. Co	462
Moring v. Ables	186
Morrison v. Bank of Cass County	417
Morse ads. Mitchell	781
Moses ads. Baxter	783
Muldoon ads. Sweeney	708
Mut. Life Ins. Co. v. Allen	245
Myers v. Kalamazoo Buggy Co	811
Myers ads. State	389
Nebraska Telephone Co. ads State	404
Neely v. Rood	802
New Orleans, etc., R. Co. v. Norwood	191
New York, etc. R. Co. ads. Darrigan	590
New York, etc., Gas Coal Co. ads. Hillard	99
New York, etc., R. Co. ads Simmonds	587
Northampton ads. Dietrich	242
Northrop v. Knowles	613
Norwood ads. New Orleans	191
Oberlin ads. Bronson	90
O'Brien v. Boston, etc., R. Co	279
O'Donnell v. Rodiger	322
Ohio Valley Protective Union ads. Schwarzbach	227
Omaha ads. Harmon	490
Parker ads. Town of Suffolk	640
Peabody Heights Co. v. Sadtler	519
Penn. Central R. Co. ads. McCormick	6
Penn. R. Co. ads. Schum	468
People v. Keeler	49
People v. Majors	295
People v. Marx	34
Perry v. House of Refuge	495
Pierce ads. Commonwealth	264
Pillsbury ads. Stevens	121
Pittsburgh, etc., R. Co. v. Kirk	675
Plants ads. State	211
Portland Savings Bank ads. Curtis	750
Potter ads. Theilan	173
Purdon ads. Health Dept	22
Quarl v. Abbett	662
Railway Co. v. Staley	74
Randall ads. Brechbill	695
Randlette v. Judkins	747
Redick v. Woolworth	410
Republican, etc., R. Co. ads. State	424
Richmond, etc., R. Co. v. Ashby	620
Rinehart v. Bills	385
Rodiger ads. O'Donnell	322
Rood ads. Neely	802
Rooney ads Sprague	383
Rowand v. Anderson	529
Rubenstein v. Cruikshanks	806
Sachs ads. Feineman	547
Sadtler ads. Peabody Heights Co	519
Saginaw Mining Co. ads. Conrad	817
Savage ads. Eames	751
Schonfield ads. Feirath	319
Schum v. Penn. R. Co	468
Schwarzbach v. Ohio Valley Protective Union	227
Schwarzman ads. Town of Burlington	571
Security Company v. Bryant	599
Semple v. Vicksburg	181
Seymour ads. Gibson	688
Shartzer v. State	501
Shell ads. Smith	365
Simmonds v. New York, etc., R. Co	587
Sugar Manuf. Co. ads. Brill	74
Smith ads. Central, etc., Banking Co	353
Smith ads. Chancey	217
Smith ads. Harker	80
Smith v. Shell	365
Smith Bridge Co. v. Bowman	67
Sohn ads. Engle	103
South, etc., Railroad Co. v. Huffmann	349
Sowles ads. Bellows	118
Spitzer ads. Cottle	305
Sprague v. Rooney	383
Staley ads. Railway Co	74
State ads. McGehee	209
State v. Martin	167
State v. Myers	389

	PAGE.
State v. Nebraska Telephone Co	494
State v. Plants	211
State v. Republican Valley R. Co	494
State ads. Shartzer	501
State ads. Woods	314
State Insurance Co. ads. Hathaway	438
Stevens v. Pillsbury	121
Stitt ads. Wilcoxson	310
Stockwell v. McHenry	475
Stone v. Yazoo, etc., R. Co	193
Stratton v. Stratton	779
Suffolk, Town of, v. Parker	660
Swan v. Hammond	255
Sweeny v. Muldoon	708
Taafe ads. Hickey	19
Thatcher ads. Hinckley	710
Thayer ads Lothrop	286
Thelian v. Potter	173
Thomas v. Ford	513
Tilton ads. Lewis	436
Trowbridge v. True	579
Troy & Boston Railroad Company. ads. Bailey	129
True ads. Trowbridge	579
Vicksburg, etc. R. Co. v. McGowan	205
Vicksburg ads. Semple	161
Vigo Agricultural Society v. Brumfield	657
Visalia v. Jacob	302
Vogel ads. Equitable Life, etc., Society	344
Way v. Chicago, etc. R. Co	421
Weber ads. Atchison, etc. R. Co	543
Weber ads. Bishop	715
Welch v. Barber	567
Westover v. Ætna Life Ins. Co	1
Wetmore v. Mellinger	485
Wheeless v. Williams	190
White v. Conly	154
White v. Equitable Nuptial Benefit Union	335
Whitney v. Chambers	286
Wilcoxson v. Stitt	310
Wilkinson ads. Hope	149
Wilkinson ads. Johnson	698
Williams ads. Wheeless	190
Winchester, Town of, ads. Holcomb	608
Winlack v. Geist	473
Witt ads. Dodd	709
Woods v. State	314
Woolworth ads. Redick	410
Worcester, city of, ads. Mannville Co	261
Yazoo, etc., R. Co. ads. Stone	193

TABLE OF CASES CITED.

PAGE.

Abbot of Stratford's Case, Y. B., 7 Hen. IV, 8 pl. 10 263
Ætna Ins. Co. v. France, 94 U. S. 561.. 230, 251
Adams v. Natick, 13 Allen, 429 260
Adams v. Wiscasset Bank, 1 Me. 361... 753
Adam's Case, L. R., 13 Eq. 474..... 660
Adee v. Bigler, 81 N. Y. 349 784
Adler v. Milwaukee Patent Brick Manf. Co., 13 Wis. 57 563
Adsit v. Butler, 87 N. Y. 585..... 784
Aiken v. Blaisdell, 41 Vt. 656..... 550
Aldrich v. Gorham, 77 Me. 288 166
Aldridge v. Br. Bank at Decatur, 17 Ala. 45 332
Alexander v. Miller, 7 Heisk. 77..... 152
Alger v. Lowell, 3 Allen, 402 260
Allen v. Hoyt, 5 Met. 324 653
Allen v Mayfield, 20 Ind. 298 694
Alnutt v. Inglis, 12 East, 527 409
Althorf v. Wolfe, 22 N. Y. 355, 366 287
American Express Co. v. Smith, 33 Ohio St. 511; 31 Am. Rep. 561 799
Am. L. & H. Ins. Co. v. Robertshaw, 26 Penn. St. 189 141
Am. Rapid Tel. Co. v. Conn. Telph. Co. 49 Conn. 352; 44 Am. Rep. 237 and note 241 404
American Tract Society v. DeWitt, 9 Allen, 447 725
Ames Iron Works v. Warren, 76 Ind. 512 664
Anable's case, 24 Gratt. 563, 570. 396
Anderson v. Bradford, 5 J. J. Marsh. 60 673
Anderson v Dunn, 6 Wheat. 204. 53, 54, 55, 60
Anderson v. Fitzgerald, 4 H. L. Cas, 484 253
Anderson v. Long, 10 S. & R. 55 184
Anderson v. Stewart, 15 Tex. 285 173
Andrews v. Spurlin, 35 Ind. 262..... 646
Angell v. Rosenbury, 13 Mich. 241, Syl. & p. 264 240
Ann v State, 11 Humph. 159 268
Anonymous case, 67 N. Y. 598 11
Anon. Cro. Eliz. 10 287
Anthony v. Slaid, 11 Met. 290..... 795
Armendiaz v. Stillman, 54 Tex. 633. 262, 263
Amstrong v. Mut. Life Ins. Co, 13 Rep. 711 142
Arndt v. Arndt, 15 Ohio, 33 655
Asberry v. Asberry, 33 Gratt. 463...619, 620
Ash v. Guie, 97 Penn St. 493; 39 Am. Rep. 815..... 438
Ashley v. Ashley, 3 Sim. 149 143, 250
Astor v. Union Ins. Co, 7 Cow. 202.... 279
Atlanta v. Green, 67 Ga. 386 423
Atlantic National Bank v. Harris, 118 Mass. 147..... 712
Attorney-General v. Calvert, 23 Beav. 248..... 720
Attorney-General v. Dublin, 38 N. H. 459. 725
Attorney-General v. Exeter, 2 Russ. 45. 752

PAGE.

Attorney-General v. Glasgow, 2 Coll. Ch. 665 720
Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371..... 22
Averson v. Kinnard, 6 East, 188..... 228
Ayerigge v. New York, etc., R. Co., 30 N. J. L. 460..... 679

Badger v. Badger, 88 N. Y. 547; 42 Am. Rep. 253 615
Bailey v. Pittsburg & Connellsville Gas, Coal & Coke Co., 69 Penn. St. 334..... 453
Baileyville v. Lowell, 20 Me. 178, 181.... 752
Bainbridge v. State, 30 Ohio St. 265.... 391
Baker v. Bank, 9 Metc. 182..... 788
Baker v. Boston, 12 Pick. 184..... 718
Baker v. Knickerbocker, 25 Kans. 290.. 541
Baker v. Roberts, 14 Ind. 553..... 668
Baker v. Union Mutual Life Ins. Co., 43 N. Y. 283..... 137
Balbach v. Frelinghuysen, 15 Fed. Rep. 675 9
Baldwin v. Railroad, 4 Gray, 333..... 746
Ballestrue v. North Mo. Ry. Co., 40 Mo. 491..... 461
Ballinger v. Tarbell, 16 Iowa. 491 667
Baltimore City Pas. Ry. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134. 283
B. & O. R. Co. v. Gallahan, 12 Gratt. 655 342
Balt. & Ohio R. v. State, 33 Md. 542 ... 280
Bancroft v. Cambridge, 126 Mass. 438.. 717
Bank of Chenango v. Brown, 26 N. Y. 469 57
Bank of Commerce v. Russell, 2 Dill. 215..... 805
Bank of Columbia v. Otely, 4 Wheat. 235..... 756
Bank v. Cooper, 2 Yerg. 599; 24 Am. Dec. 523..... 756
Bank of the U. S. v. Bank of Washington, 6 Pet. 8 222
Bank of U. S. v. Davis, 2 Hill, 452..... 10
Barbour's Executors v. Brookie, 3 J. J. Marsh. 511. 812
Barden v. Crocker, 10 Pick. 383 263
Bardwell v. Jamaica, 15 Vt. 438 89
Barger v. Durvin, 22 Barb. 63 402, 404
Barkley v. Levee Com'rs, 93 U. U. 395. 758
Barkley v. Wilcox, 86 N. Y. 140; 40 Am. Rep. 519..... 395, 396
Barnum's case..... 507
Barnard v. Poor, 21 Pick. 378..... 288
Barnes v. Trenton Gas-light Co., 12 C. E Green, 33 713
Barnett v. Eufaula Home Ins. Co., 46 Ala. 11; 7 Am. Rep. 581. 443
Barnett v. Railroad Co., 68 Mo. 56; 30 Am. Rep. 773..... 369
Barney v. Griffin, 2 N. Y. 365, 371..... 236
Barney v. Keokuk, 94 U. S. 338..... 73
Barry v. City of St. Louis, 17 Mo. 121.. 378

PAGE.

Barry v. Harris, 49 Vt. 342..... 126
Barry v. Railroad, 93 N. Y. 189; 44 Am. Rep 377 747
Barton v. Morris, 1 W. N. C. 543 762
Barton v Syracuse, 6 N. Y. 54 182
Basye v. Adams, 81 Ky. 368 292
Bawknight v. L. L. & G. Ins. Co., 55 Ga. 194 343
Bayler v. Commonwealth, 40 Penn. St. 43 485
Beale v. Beale, 1 P. Wms. 244, 246..... 240
Beard v. Beard, 22 W. Va. 130 221
Beardsley v. Smith, 16 Conn. 368 753
Beauchamp v. Inter. & Gr. N. R. Co., 56 Tex. 239; 9 Am. & Eng. R. Cas. 207.. 287, 352
Beaulieu v. Finglam, Y. B., 2 Hen. IV, fol. 18, pl. 6 287
Beddall v. Maitland, 17 Ch. Div. 174 .. 187
Beekman v. Bonsor, 23 N. Y. 298... ... 45
Beers v. Botsford, 3 Day, 159. 753
Beeston v. Weale, 5 El. & Bl. 986. 837
Beets v. State, Meigs, 105..... 155
Belknap v. Trimble, 3 Paige. 601... . .. 772
Bellows v. Patridge, 19 Barb. 176 238
Bemis v. Arlington, 114 Mass. 508 166
Benjamin v. Storr, 9 L. R. C. P. 400; 10 Eng. 231 575, 576
Benjamin's Exr's v. Smith, 17 Wend. 208 29
Bennett v. Bates, 94 N. Y. 354 24
Bennett v. Judson, 21 N. Y. 238..... 233
Bennett v. Meehan, 83 Ind. 566; 43 Am. Rep. 78 656
Bennett v. Railroad, 5 Hun, 599 ; 69 N. Y 594 ; 25 Am Rep. 250 623
Benson v. McFadden, 50 Ind 431..... 655
Benson v. Monroe, 7 Cush. 125 225
Bertholf v. O'Reilly, 74 N. Y. 515 ; 30 Am. Rep. 323 40
Bethum v Turner, 1 Green. (Me.) 111. 517
Beveridge v. Lacey, 3 Rand. 63. 577
Beverly v. Lincoln Gas light and Coke Co., 6 A. & E. 829 586
Bevin v. Conn. Life Ins. Co., 23 Conn. 244 140
Bianchi v. Nash, 1 M. & W. 545..... 586
Bickerton v. Jaques, 28 Hun, 119... 146, 147
Bielschofsky v. People, 5 Hun, 40 ; affirmed, 60 N. Y. 616 396
Bigelow v. Andress. 31 Ill. 322.. 670
Bigelow v. Hartford Bridge Co., 14 Conn. 565... 576, 578
Billings v. Brelnig, 45 Mich. 72 792
Billman v Indianapolis, etc., R. Co., 76 Ind. 166; 40 Am. Rep. 230... 797
Bills v. Comstock, 12 Metc. (Mass.) 468 415
Birdsell v. Michigan, etc., R. Co., 22 N. Y. 258. 359
Bishop v. Williamson, 2 Fairf. 295..... 337
Bissell v. Briggs, 9 Mass. 462 665
Bissell v. Mich. So. & No. Ind. R. Co., 22 N. Y. 258 357
Bissell v. R. Co., 22 N. Y. 308... 434
Bitz v. Meyer, 40 N. J. L. 252; 29 Am. Rep. 233 466
Bizzell v. Booker, 16 Ark. 308... 799
Blackman v. Johnson, 35 Ala. 252... .. 656
Blaisdell v Stephens, 14 Nev. 17 768
Blake v. Midland R. Co., 18 A. & E. 93. 31
Blake v. Stone, 27 Vt. 475..... 650
Blaney v. Rice, 20 Pick. 62.. 702
Board, etc., v. Markle, 46 Ind. 96... ... 606
Boardman v. Spooner, 13 Allen, 359 368
Bolton v. Bolton, 11 Ch. Div. 968; 32 Moak's Eng. Rep. 927 362
Booth v. McNair, 14 Mich. 19 239
Bosch v. Burlington, etc., R. Co., 44 Iowa, 402; 24 Am. Rep. 754..... 796

PAGE.

Boston v. Richardson, 13 Allen, 146 . 701
Boston Water Power Co. v. Boston & Worcester Railroad, 16 Pick. 512, 525.. 718
Bottomley v. United States, 1 Story, 135. 398
Bowe v. Hunking, 135 Mass. 380; 46 Am. Rep. 471..... 293
Bowen v. Bell, 20 Johns 116
Bowen v. Parkhurst, 24 Ill. 257 239
Bower v. Peate, 1 Q. B. Div. 321; 16 Moak Eng. R. 374 131
Bowlsby v. Speer, 2 Vroom, 351..... 836
Bowman v. Norton, 5 C. & P. 177 4, 5
Boyce's Exrs. v. Grundy, 3 Pet. 215.. 772
Boynton v. Hatch, 47 N. Y. 225 454
Bradford v. Abend, 89 Ill. 78; 31 Am. Rep. 67. 541
Bradshaw v. Lancashire & Yorkshire Ry. Co., L. R., 10 C. P. 189 34
Brander v. Brander, 4 Ves. 800..... .. 513
Brevard v. Neely, 2 Sneed. 165..... 180
Brewer v. New Gloucester, 14 Mass. 216. 753
Brewster v. McCall, 15 Com. 274 725
Brigham v. Edmands, 7 Gray, 359 718
Brigham v. Smith, 4 Gray, 297.. 274
Brigham v. Tillinghast. 13 N. Y. 220, 215. 237, 238
Briggs Iron Co. v. North Adams Iron Co , 12 Cush. 114... 704
Brinkerhoff v. Brown, 4 Johns. Ch. 671 687 674
Brinkerhoff v. Brown, 6 Johns. Ch. 157. 770
Brisbane v. Dacres, 5 Taunt. 152 224
Britton v. Nicolls, 104 U. S. 757..... 98
Broadbent v. Ramsbotham, 11 Exch. 602.. 837
Broadus v. Rosson, 3 Leigh. 25 619
Brockhaus v. Kenna, 7 Fed. Rep. 609... 147
Brockway v. Mutual Life Ins. Co., 9 Fed. Rep. 249. 135, 139, 142, 145
Broder v. Saillard, 2 Ch. Div. 692 837
Broughton v. Langley, 2 Salk. 679..... 648
Broughton v. McIntosh, 1 Ala. 103.... 222
Brown v. Bank, 31 Miss. 454..... 785
Brown v. Chicago, Mil. & St. Paul Ry. Co., 54 Wis. 342; 41 Am. Rep. 41 798
Brown v. Clark, 77 N. Y. 369. 257
Brown v. Collins, 53 N. H. 442; 16 Am. Rep 372 799
Brown v. Curran, 58 How. Pr. 303 100
Brown v. Goble, 97 Ind. 86, 89..... 667
Brown v. Maryland, 12 Wheat. 444; 24 How. 123; 15 Penn St. 353 307
Brown v. McKinnally, 1 Esp. 279 224
Brown v. Memphis & Charlestown R. Co., 5 Fed. Rep. 499; 1 Am. & Eng. R. Cas. 247.. 544
Brownell v. People, 38 Mich. 732 635
Brown v. Riggin, 94 Ill. 560. 323
Brown v. Winona & St. Peter R. Co., 27 Minn. 162; 38 Am. Rep. 285 595
Brown v. Wood's Appeal, 3 W. N. C. 35. 477
Brua's Appeal, 55 Penn. St. 299.... 385
Brummer v. Cohn, 86 N. Y. 11; 40 Am Rep. 503.. 137, 321
Brunson v. Bacon, 1 Root. 210... ... 222
Buffalo v. O'Malley, 61 Wis. 255; 50 Am. Rep. 137 and note. 139 ... 219
Buffett v. Troy & Boston R Co., 40 N. Y. 168 359
Bugbee v. Sargent, 23 Me. 269..... .. 770
Bulwer's case, 7 Rep. Ia. 2b 263
Bunnell's Appeal, 69 Penn. St. 62.. 573, 577
Burchett v. Durdant, 2 Ventr. 311 . 648
Buckholter v. McConnellsville, 20 Ohio St. 309.. 93
Burdet v. Hopegood, 1 P. Wms. 486 ... 243
Burdick v. Post, 6 N. Y. 522 236
Burnham v. Gr. Trunk R'y Co., 63 Me. 298; 18 Am. Rep. 220 393

PAGE.

Burnham v. Morrissey, 14 Gray, 226..55, 56
Burnham v. N. W. Ins. Co., 36 Iowa, 533 455
Burnett v. Ins. Co., 46 Ala. 11; 7 Am. Rep. 581 440
Burns v. People, 1 Park. Cr. 182 302
Burr v. Burr, 10 Paige, 20 780
Burt v. McKinstry, 4 Minn. 215 240
Burton v. Scherpf, 1 Allen, 133 699
Buss v. Dyer, 125 Mass. 287 274
Buswell v. Bicknell, 17 Me. 344 583
Button v. American Tract Society, 23 Vt 336, 349 725
Butler v. Burleson, 16 Vt. 176 126
Butler v. Lee, 11 Ala. 885 332
Butler v. Peck, 16 Ohio St. 334 837
Byers v. Franklin Coal Co., 106 Mass. 131 108, 111
Byrne v. Wilson, 15 Ir. C. L. 332, 342 89

Cabot v. Christie, 42 Vt. 121 233
Cadigan v. Brown, 120 Mass 494 772
Cairo, etc., R. Co. v. People, 92 Ill. 170. 577
Caledonian Railway v. Sprot, 2 Macqueen, 449 276
Callahan v. R. R. Co., 23 Iowa, 562 131
Calvert v. Aldrich, 99 Mass. 74 276
Cambridge v. Munroe, 126 Mass. 496 717
Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. Law. 15 343
Came v. Brigham, 39 Me. 35 755
Cammack v. Lewis, 15 Wall. 643 144, 251, 252, 319
Campbell v. Charter Oak, etc., 10 Allen, 213 5
Campbell v. Mackay, 1 M. & C. 543 770
Campbell v. N. E. Mut. Life Ins. Co., 98 Mass. 381 141, 231, 232, 253
Campbell v. Seaman, 63 N. Y. 582; 20 Am. Rep. 567 773
Camp's Appeal, 36 Conn. 88; s. c., 4 Am. Rep 39. 604
Canfield v. Andrews, 54 Vt. 1. 771
Canfield v. West Cott, 5 Cowen, 270 312
Cannon v. N. W. Mut. Life Ins. Co., 29 Hun, 470 143
Canterbury v. Attorney-General, 1 Phil. 306 289
Carmichael v. Adams, 91 Ind. 526 667
Carpenter v. Eastern Transp. Co., 71 N. Y. 574. 686
Carroll v. Green, 92 U. S. 509 788
Carroll v. P. R. Co., 2 Pennypacker, 158. 470, 472
Carson v. Murray, 3 Paige, 483 780
Carstairs v. Mechanics & Traders' Ins. Co., 18 Fed. Rep. 473 731
Carter v. Canterbury, 3 Conn. 461 222
Cartwright v. Gardner, 5 Cush. 281 313
Cartwright v. Wilmerding, 24 N. Y. 521, 533 704
Case v. Beauregard, 101 U. S. 688 785
Cashman v. Thayer M. Co., 76 N. Y. 365; 32 Am. Rep. 315 86
Cave v. Cave, 15 Ch. D. 639 712
Cary v. Cleveland & Toledo R. Co., 29 Barb. 35 359
Cary v. Hotaling, 1 Hill, 311, 316 396
Chadwick v. Marsden, L. R., 2 Exch. 284 837
Chalfant v. Payton, 91 Ind. 202; 46 Am. Rep. 586 329, 331
Chamberlain v. Williamson, 2 M. & S. 408 29
Chambers v. Falkner, 65 Ala. 448 256
Chambers v. Furray, 1 Yeates, 167 517
Charter v. Charter, L. R., 7 H. L. 364 720
Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419; 4 Am. Rep. 328 137, 321

PAGE.

Chase v. Bank, 19 Pick. 568 753
Chase v. Merrimack Bank, 19 Pick. 568. 753
Chase v. Washington Ins. Co., 12 Barb. 595 730
Cheeseborough v. Green, 10 Conn. 318. 276
Chew v. Barnet, 11 S. & R. 391 485
Chicago, etc., R. Co. v. George, 19 Ill. 510 656
Chicago, etc., R. Co. v Michie, 83 Ill 427 435
Chicago, etc., R. Co. v. McLallan, 84 Ill. 109 594
Chicago, etc., R. Co. v. Miller, 46 Mich. 537 792
Chicago, Milwaukee & St. Paul Railway Co v. Ross, 112 U. S. 377 592
Chicago & Northwestern R'y v. Bayfield, 37 Mich. 205 735, 737
Chic. & N. W. R. Co. v. People, 56 Ill. 365; 8 Am. Rep. 690 409, 410
Chipman v. Palmer, 77 N. Y. 56; 33 Am. Rep. 586 769
Chrisholm v. National Capital Life Ins. Co., 52 Mo. 213, 14 Am. Rep. 414 137
Chouteau v. Dean, 7 Mo. App. 210 456
Church v. Ayens, 5 Cow. 273 312, 313
Church v. Drummond, 7 Ind. 17 185
Cit. Bank v. Nan. St. Co., 2 Story, 16 335
City of Akron v. Chamberlain Co., 34 Ohio St. 328; 32 Am. Rep. 367 420
City of Atchison v. Twine, 9 Kans. 350. 524
City of Cambridge v. County Commissioners., Mass. Supreme Ct., June, 1883. 111
City of Elgin v. Eaton, 83 Ill. 535; 25 Am. Rep. 412 420
City of Indianapolis v. Huffer, 80 Ind. 235 655
City of MacGregor v Boyle, 34 Iowa, 268 182
City of Montgomery v. Taylor, 33 Ala. 116. 182
City of New Haven v. Sargent, 38 Conn. 50. 572
City of New Orleans v. LeBlanc, 34 La. Ann. 596 112
City of Terre Haute v. Beach, 96 Ind. 143. 667
Civil Rights cases, 109 U. S. 3 696
Clader v. Thomas, 89 Penn St. 343. 477
Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496 143, 250, 252
Clark v. Durand, 12 Wis. 223. 146
Clark v. Fisher, 1 Paige, 176 172
Clark v. Fuller, 21 Barb. 128 238
Clark v. H. & St. Jo. R. Co., 86 Mo. 218. 375
Clark v. Pinney, 6 Cow. 297 222
Clark v. Stewart, 56 Wis. 154 772
Clark v. Tarbell, 58 N. H 88. 664
Clark v. Wilson, 103 Mass. 219; 4 Am. Rep. 532 686
Clarke v. Sawyer, 3 Sandf. Ch. 351 323
Clayton v Gresham, 10 Ves. 288 513
Clem v. State, 42 Ind. 420; 13 Am. Rep. 339. 299, 300
Clement v. Kimball, 98 Mass. 538 615
Cleveland v Spilman, 25 Ind. 95 649
Clough v. Clough, 117 Mass. 85 750
Clough v. Davis, 9 N. H. 500 332
Clowes v. Staffordshire Potteries Co. L. R., 8 Ch. App. 125 772
Coale v. Hannibal & St. Joseph R. Co., 60 Mo. 227 291
Cobb v. Boston, 109 Mass. 438; 112 Mass. 181. 717
Cobb v. Curtiss, 8 Johns. 470 222
Coe v. Winnipiseogee Manuf. Co., 37 N. H. 289 771
Coffman v. Reeves, 62 Ind. 334 655

PAGE.

Cole v. Marple, 98 Ill. 58; 38 Am. Rep. 88 321
Coleman v. Hutchenson, 3 Bibb, 209 694
Collamore v. Wilder, 19 Kans. 67 524
Collier v. Slaughter, 20 Ala. 268 337
Collins v. Council Bluffs, 32 Iowa, 324; 7 Am. Rep. 200 89
Commercial Bank of Albany v. Hughes, 17 Wend. 94 9
Comm'rs of Pottawatamie Co. v. Morrall, 10 Kans. 141 546
Commonwealth v. Barnacle, 134 Mass. 216 685
Commonwealth v. Blair, 126 Mass. 40.. 271
Commonwealth v. Boston & Lowell Railroad, 134 Mass. 211 707
Commonwealth v. Campbell, 9 Casey, 380 762
Commonwealth v. Coe, 115 Mass. 481... 391
Commonwealth v. Colberg, 119 Mass. 350 270
Commonwealth v. Drew, 4 Mass. 391, 396 268, 270
Commonwealth v. Eastman, 1 Cush. 189 396
Commonwealth v. Farren, 9 Allen, 489. 270
Commonwealth v. Fox, 7 Gray, 585..... 268
Commonwealth v. Gamble, 62 Penn. St. 352 688
Commonwealth v. Hallett, 103 Mass. 452. 270
Com. v. McCarthy, 119 Mass. 354 397
Commonwealth v. Macloon, 101 Mass. 1. 271
Commonwealth v. Mink, 123 Mass. 422, 425 270
Com. v. Natural Gas Co., Penn. Com. Pleas 762
Commonwealth v. Parker, 9 Metc. 263. 244
Commonwealth v. Power, 7 Metc. 596; 41 Am. Dec. 465 544
Commonwealth v. Randall, 4 Gray, 36.. 270
Com. v. Regan, 105 Mass. 593 504
Com. v. Roby, 12 Pick. 496 301
Com. v. Stone, 4 Metc. 43, 47. 391
Commonwealth v. Stratton, 114 Mass. 303, 305 270
Commonwealth v. Sturtevant, 117 Mass. 122; 19 Am. Rep. 401..... 656
Commonwealth v. Thompson, 6 Mass. 134 265, 267
Com. v. Tuckerman, 10 Gray, 173..... 396
Com. v. Turner, 3 Met. 19..... 394
Commonwealth v. Webster, 5 Cush. 295, 306 270
Com. v. Zelbert, Whart. Hom. 506.... 636
Connecticut Ins. Co. v. Schaefer, 94 U. S. 457 251, 254
Connecticut M. Life Ins. Co. v. New York, etc., R. Co., 25 Conn. 265..... 686
Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457 137, 141, 142, 143
Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250 5
Connell v. Voorhees, 13 Ohio, 523..... 336
Conner v. Railroad Co., 59 Mo. 285.... 372
Connor v. Allen, 33 Ala. 515..... 338, 339
Conrad v. Smith, 32 Mich. 429.....575, 576
Continental Life Ins. Co. v. Volger, 89 Ind. 572; 46 Am. Rep. 185..... 317
Continental Life Ins. Co. v. Webb. 54 Ala. 688 320
Converse v. Converse, 21 Vt. 168..... 324
Cook v. Tullis, 18 Wall. 341 804
Cook v. Walthall, 20 Ala. 334 609
Cool v. Peters Box, etc., Co., 87 Ind. 531. 668
Cooley v. Board, etc., 12 How. 299..... 696
Coombs v. New Bedford Cordage Co., 102 Mass. 572; 3 Am. Rep. 506 734
Cooper v. Maupin, 6 Mo. 624 371
Cooper v. Slade, 6 H. L. Cas. 772..... 559

PAGE.

Cooper v. Smith, 9 Serg. & R. 26..... 517
Co-operative Association v. Leflore, 59 Miss. 2 syl. 4, 5..... 238
Copenhagen v. State, 14 Ga. 8..... 299
Coppage v. Alexander, 2 B. Mon. 313; 38 Am. Dec. 156 (note)..... 327
Corcoran v. Doll, 32 Cal. 80..... 419
Corey v. Greene, 51 Me. 115..... 784
Cornfield v. Coryell, 4 Wash. C. C. 380.. 40
Corning v. Lowerre, 6 Johns. Ch. 439.. 575, 576, 577
Correio v Lynch, 65 Cal. 273.. 112
Cortelyou v. Lansing, 2 Cai. Cas. 200... 487
Cortelyou v. Van Brunt, 2 Johns. 357.. 516, 517
Countess of Salop v. Crompton, Cro. Eliz. 777, 784 291
Countess of Salop's case, 5 Co. 13 290
Countess of Shrewsbury's case, 5 Rep. 136 291
County of Mobile v. Kimball, 101 U. S. 691 696
Craddock v. Stalcup, 1 Tenn. 351..... 170
Craig v. People, 47 Ill. 496 574
Cranson v. Smith, 37 Mich. 309; 26 Am. Rep. 514 697
Cranz v. White, 27 Kans. 319; 41 Am. Rep. 408..... 741
Crawford v. Rohrer, 59 Md. 599 455
Creed v. Com. Bank of Cincinnati, 11 Ohio, 489..... 88
Creed v. Penn. R. Co., 86 Penn. St. 139; 27 Am. Rep. 693 434
Cregin v. B. C. R. Co., 75 N. Y. 194; 38 Am. Rep. 474 29, 33
Crenshaw v. State River, 6 Rand. 245 577
Crislip v. Cain, 19 W. Va. 471, 472, 491-498..... 233
Crittenden v. White, 23 Minn. 24; 23 Am. Rep. 676.. 697
Crittendon v. Phœnix Life Ins. Co., 41 Mich. 442 147
Crocker v. Gullifer, 44 Me. 498 583
Crocker v. New London, etc., R. Co., 24 Conn. 249 660
Crockett v. Crockett, 22 Eng. Ch. Rep. 553 653
Cross v. Richardson, 30 Vt. 641 120
Crossley v. Lightowler, L. R., 3 Eq. 279. 769
Crouch v. Gridley, 6 Hill, 260 610
Croucher v. Wilder, 98 Mass. 322 279
Crowfoot v. London Dock Co., 3 Cromp. & Mills, 637 492
Cowan v. Iowa State Ins. Co, 40 Iowa, 551; 20 Am Rep. 583 443
Cowan v. State Ins. Co., 40 Iowa, 551; 20 Am. Rep. 583 440
Cowley v. People, 83 N. Y. 464; 38 Am. Rep. 464 21
Culver v. Dwight, 6 Gray, 444 656
Cummings v. Collins, 61 Mo. 520..... 737
Cummings v. Railroad Co., 70 Mo. 570.. 369
Currier v. Cont. Life Ins. Co. 316
Cushing v Bedford, 125 Mass. 526..... 718
Cushing v. Drew, 97 Mass. 445 127
Cunningham v. Smith, 70 Penn. St. 450. 250

Daily v. Worcester, 131 Mass. 453... ... 260
Dakin v. Williams, 17 Wend 447..... 126
Dalby v. India & London Assur. Co., 15 C. B. 365; 28 Eng. Law & Eq. 312... 139, 142, 255
Dalton v. Angus, 6 App. Cas. 740 277
Dalyell v. Tyrer, El. Bl. & El. 899..... 143
Dana v. Haskell, 41 Me. 25..... 784
Danbert v. Picket, 4 Mo App. 591..... 595
Dance v. Seaman, 11 Grat. 778 235
Daniels v. Ballantine, 23 Ohio St. 532; 13 Am. Rep. 264 795

PAGE.

Daniels v. Hudson R. F. Ins. Co., 12 Cush. 416 232, 278
Daniels v. Pond, 21 Pick. 367..... 290
Darbison v. Beaumont, 1 P. Wms. 229.. 648
650
Dash v. Van Kleeck, 7 Johns. 498; 5 Am Dec. 291 57
Davis v. Dudley, 4 Allen, 557..... 766
Davis v. Londgreen, 8 Neb 47..... 580
Davis v. Ney, 125 Mass. 590; 28 Am. Rep. 272..... 44, 751
Davis v. Old Col. R. Co., 131 Mass. 258; 41 Am. Rep. 221 356
Davis v. State, 3 Lea, 379..... 374, 375
Davidson v. New Orleans, 96 U. S. 97... 757
Davidson v. People, 4 Colo. 145 635
Dawson v. Coffey, 12 Oreg. 513..... 674
Day v. Allender, 22 Md. 511..... 516
Day v. Pool, 63 Barb. 508; 52 N. Y. 416; 11 Am. Rep. 719 64, 65
Day v. Roth, 18 N. Y. 448..... 43
Dayton v. Borst, 31 N. Y. 435 456
Dean v. Braithwaite, 5 Esp. 35..... 193
Dearborn v. Turner, 16 Me. 17 584, 586
De Forrest v. Wright, 2 Mich. 368..... 379
Delano v. Ins. Co., 10 Mass. 354 794
Delaplaine v. Railway Co., 42 Wis. 225 . 73
Delmonico v. City of New York, 1 Sandf. 222 182
Dennett v. Nevers, 7 Me. 399 222
Denton v. Great Northern Ry. Co., 5 E. & B 860 660
Derby v. Alling, 40 Conn. 410..... 572
Dermani v. Home Mut. Ins. Co., 26 La. Ann. 69; 21 Am. Rep. 544..... 440, 443
Dermani v. Ins. Co., 26 La. Ann. 69; 21 Am. Rep. 544..... 440
Detroit, etc., R. Co. v. Van Steinburgh, 17 Mich. 118 792
Dial v. Gary, 14 S. C. 573; 37 Am. Rep. 737 447
Dickey v. Tennison, 27 Mo. 373 371
Dickins v. N. Y. Cent. R. Co., 23 N. Y. 158 32
Dickinson v. Grand Junction Canal Co. 7 Exch. 283 838
Dietrick v. Penn. R. Co., 71 Penn. St. 432; 10 Am. Rep. 711. 624
Dill v. State, 1 Tex. Ct. App. 278. 316
Dillaway v. Butler, 135 Mass. 479..... 712
Dingley v. Boston, 100 Mass. 544 717
Dix. v. Mercantile Ins. Co., 22 Ill. 273 .. 442
443
Dixon v. Ramsey, 3 Cr. 319..... 315
Dockray v. Mason, 48 Me. 178 784
Dodsley v. Varley, 12 Ad. & El. 632..... 490
Doe v. Jackman, 5 Ind. 283 646
Dornuell v. Ward, 108 Ill. 216 785
Dostal v. McCadden, 35 Iowa, 318 533
Dounce v. Dow, 57 N. Y. 16 65
Dovaston v. Payne, 2 Sm. L. Cas. 90, 94, 95..... 519
Dowell v. Lahr, 97 Ind. 146 668
Dowlson v. Matthews, 4 T. R. 503..... 263
Downing v. Mt. Wash R. Co., 40 N. H. 230 355
Downs v. Railroad, 36 Conn. 287..... 623
Drake v. Board of Trustees, 11 Iowa, 54 438
Dreier v Continental Life Ins. Co., 24 Fed Rep. 670 4
Drummond v. Attorney-General, 2 H. L. Cas. 837..... 720
Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176 795
Dudley v. Jamaica Pond Aqueduct Co., 100 Mass. 138..... 108
Duff v. Allegheny R. Co., 91 Penn. St. 458; 36 Am. Rep. 675..... 436
Duff v. Good, 24 W. Va. 682..... 218

PAGE.

Duke de Cadaval v. Collins, 4 A. & E. 858..... 225
Duke of Buccleugh v. Coman, 5 Macp. 214 769
Duncan v. Kirkpatrick, 13 S. & R. 292.. 222
Duncan v. Ware, 5 Stew. & P. 119..... 222
Dunham v. Averill, 45 Conn. 61; 29 Am. Rep. 642 725
Dunham v. Rackliff, 71 Me. 345..... 746
Dunham v. Waterman, 17 N. Y. 9-18 236
237, 239, 404
Dunlap v. Dunlap, 4 Desaus. 305..... 694
Dunlevy v. Tallmadge, 32 N. Y. 457 670
Dunn v. Grand Trunk Ry. Co., 58 Me. 192 434
Dustin v. Cowdry, 23 Vt. 631 187

Eachus v. Illinois & Michigan Canal, 17 Ill. 534 262
Eadie v. Slimmon, 26 N. Y. 9, 17..... 135
Earl v. De Hart, 1 Beasl. Ch. 280 836
Earl of Ripon v. Hobart, 3 Myln. & Keen, 179 23
Eastman v. Company, 47 N. H. 78..... 23
Eastman v. Sanborn 89
Eaton v. Telegraph Co., 68 Me. 63, 67. 744
Eaves v. Estes, 10 Kans. 314..... 533
Eberly v. Rupp, 90 Penn. St. 259 466
Edgerton v. N. Y., etc., R. Co., 39 N. Y. 227 434
Edington v. Ætna Life Ins. Co., 77 N. Y. 564 8
Edington v. Mutual Life Ins. Co., 67 N. Y. 185 3, 4
Eggler v. People, 56 N. Y. 642..... 636
Elder v. Dyer, 26 Kans. 604..... 401
Elliot v. Fitchburg Railroad, 10 Cush. 191. 284
Elliott v. Van Buren, 33 Mich. 49; s. c., 20 Am. Rep. 668 656
Ely v. Cook, 18 Barb. 614 240
Embrey v. Owen, 4 Eng. L. & Eq. 466... 838
Emerson v. Slater, 22 How. 23..... 120
Emery v. Lowell, 104 Mass. 13 182
Equitable Life Ins. Co. v. Patterson, 41 Ga. 338; 5 Am. Rep. 535..... 137, 138, 139
Estate of Mueller, 31 Alb. L. J. 283..... 138
Evans v. Neails, 87 Ind. 262..... 660
Evans v. People, 12 Mich. 27..... 656
Evening Journal Association v. State Board of Assessors, 47 N. J. Law, 36.. 107
Everingham v. Vanderbilt, 12 Hun, 75 674
Ewer v. Coffin, 1 Cush. 23..... 665
Exchange Bank v. Inloes, 7 Md. 391 ... 239
Ex parte Asiatic Banking Corporation L. R., 2 Ch. App. Cas. 391 660
Ex parte Curtis, 106 U. S. 371..... 629, 631
Ex parte Robinson, 2 Biss. 309..... 697
Ex parte Schollenberger, 96 U. S. 369. . 342
Ex parte Taylor, 58 Miss. 478; 38 Am. Rep. 338..... 761

Fairbanks v. Jacobus, 14 Blatchf. 337.. 78
Fairbanks v. Kerr, 70 Penn. St. 90; 10 Am Rep. 664 797
Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 625 141, 143
Fairfield v. Lawson, 50 Conn. 501..... 585
Falconer v. Freeman, 4 Sandf. Ch. 565. 671
Farnan v. Brooks, 9 Pick. 212..... 788
Farnsworth v. Boston, 121 Mass. 173... 717
Farrand v. Marshall, 19 Barb. 380; 21 Barb. 409 581
Farrar v. Haselden, 9 Rich. Eq. 331 673
Farwell v. Boston & Worcester R. Co, 4 Metc. 49. 595
Fearn v. Ward, 65 Ala. 33 320, 322
Feital v. Middlesex Railroad, 109 Mass. 398..... 333

PAGE.

Fellows v. Allen, 60 N. H. 439; 49 Am. Rep. 328 and note 329 255
Feltham v. England, L. R., 2 Q. B. 33 . 595
Fent v Toledo, etc., R. Co., 59 Ill. 349; 14 Am. Rep. 13. 792
Fenton v. Dublin Packet Co., 8 Ad. & Ell. 835. 193
Feoffees of Heriot's Hospital v. Ross, 12 Clark & Fin. 507 500
Ferguson v. Massachusetts Mut. Life Ins. Co., 32 Hun, 306 139, 142
Ferguson's case, 1 Lewin, 181..... 267
Fernald v. Lewis, 6 Me. 268 753
Ferry v. Williams, 41 N. J. L. 332; 32 Am. Rep 219 801
Field v. Holzman, 93 Ind. 205 . . . 667, 670
Filliter v. Phippard, 11 Q. B. 347... 287, 288, 289
Finch v. Rogers, 11 Humph. 559, 564 .. 171
Finlay v. Lycoming Ins Co., 30 Penn. St. 311. 443
Fisher v. Bassett, 9 Leigh, 119; 33 Am. Dec. 237 619
Fisher v. Mellen, 103 Mass 506 233
Fisher v. Smith, 9 Gray, 441 701
Fisk v. R. Co., 53 Barb. 513 453
Fitch v. Am. Pop. Life Ins Co., 2 Thomp & Cook, 247 232
Flagg v. Inh of Milbury, 4 Cu-h. 243.. 333
Flanagan v. Meyer, 41 Ala. 132.. 332
Fletcher v. Morey, 2 Story, 555..... 489
Fletcher v Peck, 6 Cranch, 87.. 752
Flint, etc , R Co. v. Weir, 37 Mich. 111, 434
Flitcroft's case, 1 Ch. Div. 519 789
Fogg v. Middlesex Ins. Co., 10 Cush. 337 248
Foot v. Ætna Life Ins. Co ,61 N. Y. 571. 230
Foot v. Edwards, 3 Blatchf 310 262, 263
Forbes v. American Mut. Life Ins. Co., 15 Gray, 249 146, 247
Forbs v. Appleton, 5 Cush 115 225
Ford v Fitchburg R. Co , 110 Mass 260; 14 Am. Rep. 598 595
Former v. Seidmecher, 75 Mo. 113 . . 15
Fort v. Groves, 29 Md. 188 577
Forse and Hembling's Case, decided in 1589. 4 Rep. 60b. 256
Fosdick v. Sturges, 1 Biss. 255..... 453
Foster v. Dudley, 30 N. H. 463.. 609
Foster v. Essex Bank, 17 Mass. 479..... 338
Foster v. Gile, 50 Wis. 603 146
Foster v. Metts, 55 Miss. 77; 30 Am. Rep. 504. 336
Foster v. Ropes, 111 Mass. 16 585
Fowler v. Ætna Fire Ins Co., 6 Cow. 675; 16 Am. Dec. 460 ... 184
Fowler v. Buttery, 78 N. Y. 73; 34 Am. Rep. 507 137
Fowler v. Scully, 72 Penn. St. 465. .. 385
Fox v. Pennsylvania Mutual Life Ins. Co , 4 Big. L. & A. Ins. Cas 458.. ... 139
Frances v. Etna Life Ins. Co., 2 Ins. L. J. 657... 138
Francis v. St. Louis Transfer Co., 5 Mo. App. 7.. 794
Frank v. Kessler, 30 Ind. 8.. 670
Franklin v. Low, 1 Johns. 402 26
Franklin Fire Ins. Co. v. Hazzard, 41 Ind. 116; s. c , 13 Am. Rep. 313 ...144, 251, 252, 318
Franklin Ins. Co. v. Sefton, 53 Ind. 380. 144, 251
Fraternal Mut Ins. Co. v. Applegate, 7 Ohio St. 292 228
Frechette v. La Compagnie Manufacturiere De St. Hyacinthe, 9 App. Cas., H. of L. 170 838
redendall v. Taylor, 26 Wis. 286..... 438
Frederick v. Railroad, 37 Mich. 342; 26 Am. Rep 531 623

PAGE.

Freeholders v. State, 4 Zabr. 718 194
Freeland v. People, 16 Ill. 380 391
Freeman v. Freeman, 9 Heisk. 201.... 171
Frey v. Drahos, 6 Neb. 1; 29 Am. Rep. 353. 382
Friend v. Hamill, 34 Md. 298 396
Frink v. Lawrence, 20 Conn. 117 ... 575, 576
Fry v. State, 63 Ind. 552.... 696

Gaines v. Chew, 2 How. 642. 770
Galena & Chicago U. R. Co. v. Rae. 18 Ill. 488 461
Galsworthy v. Strutt, 1 Exch 659... 127
Galveston, H. & San A. R. Co. v. Donahoe, 56 Tex. 162 352
Gambs v. Covenant Life Ins. Co., 50 Mo. 44 137, 146, 147
Garrelon v. Hampden Fire Ins. Co., 50 Me. 580 231
Gardiner v. Farmingdale, 45 Me. 537 .. 742
Gardner v. Newburgh, 2 Johns. Ch. 165. 772
Garner v. Germania Life Ins. Co 32 Alb. L. J. 91 146, 147
Garner's case, 3 Gratt. 655.. 213
Ga R. & Banking Co. v. McCurdy, 45 Ga. 288; 12 Am. Rep. 577 382
Gaskill v. Dudley, 6 Metc. 546 753
Gates v. Andrews, 37 N Y. 657 287
Gavitt v. Chambers, 3 Ohio, 497. 73
Gayle v. Blackburn, 1 Stew. 429.... 345
Gaylord v. Soragen, 32 Vt. 110 580
Gearhart v. Boatman's Savings Inst. 38 Mo. 60 96
Gemmell v. Rice, 13 Minn. 400 668
Gerety v. Railroad Co., 81 Penn. St. 274. 471
Getchell v. Chase, 37 N. H. 105.. .. 609
Gibbons v. Pepper, 1 Ld. Raym. 38 . 709
Gilman v. Eastern R., 10 Allen, 233 ... 279
Gilmore v. Driscoll, 122 Mass. 199; 23 Am. Rep. 312..... 277
Gill v. Balls, 72 Mo. 424 455
Gillham v. Madison Ry. Co., 49 Ill 484 537
Gilshannon v. Stonybrook R. Corp., 10 Cush. 228 279, 281
Glading v Frick, 88 Penn. St. 460. 477
Glauz v Gloeckler, 104 Ill. 573; 44 Am. Rep. 94 147
Glendale Manufg. Co. v. Protection Insurance Co., 21 Conn. 37 586
Goldsmith v. Elsas, 53 Ga 186... 581
Goodhue v. Clark, 37 N. H. 525 .. 725
Goodright v. White, 2 W. Bl 1010.. 649
Goodwin v. Massachusetts Mutual Life Ins Co., 73 N. Y. 480, 497 139
Goodwin v. State, 96 Ind. 550 656
Gonzales v. Barton, 45 Ind. 295 646
Gordon v. Swan, 43 Cal. 564 311
Gormley v. Ohio, etc., Ry. Co., 72 Ind. 31.. 378
Gormley v. Sanford, 52 Ill. 158..... 537
Gorton v. Brown, 27 Ill. 489 466
Goshorn v. Purcell, 11 Ohio St. 641 .. 91
Gottschalk v. C. B. & Q. Ry. Co., 14 Neb 550 423
Gough v. St. John, 16 Wend. 646 .. 184
Grant v Chase, 17 Mass. 443 ... 363, 364
Grattan v Metropolitan Life Ins. Co. 80 N. Y. 281; 36 Am. Rep. 617..... 3, 5
Gratton v. National Life Ins. Co., 15 Hun, 74 138
Graves v Berdan, 26 N. Y. 498 . . . 100, 276
Gray v. Coffin, 9 Cush. 205 755
Gray v. Hook, 4 N. Y. 449 415
Great Northern Ry. Co. v. Harrison, 10 Exch. 376 434
Green v. Boston and Lowell Railroad, 128 Mass. 221; 35 Am Rep 370 289
Green v. Cochran, 43 Iowa, 544 .. 467
Green v. Hudson R. R Co., 28 Barb. 39. 36

PAGE.

Green v. Lond. Gen. Om. Co., 7 C B (N. S.) 290 ... 357
Green v Oakes, 17 Ill. 249 ... 577
Green v. Stone, 1 H. & J. 405 ... 422
Green v. Van Buskirk, 7 Wall. 139 ... 661
Greenleaf v. Edes, 2 Minn. 264 ... 239
Greenleaf v. Mumford, 50 Barb. 543.. 671, 672
Greenway v Thomas, 14 Ill. 271 ... 673
Gregory v. Burlington, etc., R. Co., 10 Neb. 250 ... 434
Griffin v. Nitcher, 57 Me. 270 ... 670, 784
Grover & Baker Sewing Machine Co. v. Butler, 53 Ind 454; 21 Am. Rep. 200.. 697
Groves v. Kilgore, 72 Me. 491 ... 759
Grubbs v McDonald, 91 Penn. St. 236... 323
Guardian Mutual Life Ins. Co. v. Hogan, 80 Ill 35 ... 138, 141, 145, 317, 319
Guerin v. Hunt, 8 Minn. 490 ... 240
Guille v. Swan, 19 Johns. 381; 10 Am. Dec. 274 ... 15
Gunn v. Cent. R. & Banking Co ... 355
Gurney v At. & G. West. R. Co., 58 N. Y. 358 ... 65
Gutzwiller v. Lackman, 23 Mo. 168 ... 185

Hadley v Baxendale, 9 Exch. 341 ... 259
Hahn v. Kelly, 34 Cal. 391 ... 667
Haigh v. Building Association, 19 W. Va. 792 ... 222
Haight v. Hayt, 19 N. Y. 464 ... 28, 29, 31
Haines v. Campbell, 8 Wis. 187 ... 239
Halford v. Hymer, 10 B. & C. 725 ... 137
Hall v. DeCuir, 95 U. S. 455 ... 196, 197
Hall v. Howard Ins. Co., 14 Wend. 385. 231
Hambly v. Trott Cowp. 371 ... 25
Hamlet v. Richardson, 9 Bing. 644 ... 225
Hamm v. Romine, 98 Ind. 77 ... 656
Hamm v. San Francisco, 17 Fed. 119 ... 702
Hammatt v. Emerson, 27 Me. 308, 326... 233
Hammett v. Blount, 1 Swan, 385 ... 170
Hammons v. State, 59 Ala. 164 ... 333
Handley's Lessee v. Anthony, 5 Wheat. 375 ... 212
Hankins v. Ingols, 4 Jackf. 35 ... 671
Hanson v. Johnson, 62 Md. 25; 50 Am. Rep. 199 ... 171
Happy v. Mosher, 48 N. Y. 313 ... 57
Hardesty v. Smith, 3 Ind. 39 ... 658
Harnett v. Maitland, 16 M. & W. 257... 291
Harper v. Archer, 4 Sm. & M. 99 ... 244
Harper v. Butler, 2 Pet. 239 ... 447
Harrell v. Whitman, 19 Ala. 135 ... 670
Harrington v. Rich, 6 Vt 666 ... 119
Harris v. Mackintosh, 133 Mass. 230.... 773
Harris v. Ryding, 5 M. & W. 60 ... 276
Harrison v. Berkley, 1 Strobh. 548 ... 88
Hart v. Rensselaer & S. R. Co., 4 N. Y. 37. 359
Hart v. Western Railroad, 13 Met. 99; 46 Am. Dec. 719 ... 729
Hartford Fire Ins. Co. v. Ross, 23 Ind. 179 ... 442
Hartford & New Haven R. Co. v. Croswell, 5 Hill, 383 ... 456
Hartford & New Haven R. Co. v. Kennedy, 12 Conn. 499 ... 456
Hartley v. Rice, 10 East, 22 ... 328
Hartshorn v Eames, 31 Me. 93 ... 784
Harvard College v. Armory, 26 Mass. 446. 513
Harvard College v. Stearns, 15 Gray, 1.. 576
Harvey v. Murray, 136 Mass 377 ... 293
Haskins v. Haskins, 9 Gray, 390 ... 557
Haskins v. People, 16 N. Y. 344 ... 316
Hathorn v. Calef, 2 Wall. 10 ... 754
Haven v. Emery, 33 N. H. 66 ... 533
Hawkes v. Kennebunk, 7 Mass. 463. ... 758
Hawley v. Bibb, 69 Ala. 52 ... 317
Hawthorn v. New Castle & North Shields R'y Co., 3 Q. B. 949; 3 Ad. & El (N. S.) 734 ... 492

PAGE.

Hayes v. Waldron, 44 N. H. 580 ... 776
Hayes v Wells, 23 Cal. 185 ... 434
Hayford v. Everett, 68 Me. 507 ... 753
Haynes v State, 17 Ga. 465 ... 635
Haye v. Jackson, 6 Mass. 156 ... 151
Hayward v Cain, 105 Mass. 213 ... 686
Hayward v. Clark, 50 Vt. 612 ... 741
Hazard v Irwin, 18 Pick. 95 ... 233
Hazlett v. Powell, 30 Penn. St. 293. ... 101
Head v. Providence Ins. Co., 2 Cranch, 127 ... 498
Heald v. Carey, 11 C. B 977 ... 338
Heard v. Horton, 1 Denio, 165 ... 649
Heard v. State, 9 Texas App. 1 ... 591
Hebdow v. West, 3 Best & S. 578 ... 140
Heermance v. James, 47 Barb. 120 ... 387
Helm v. First Nat. Bank, 43 Ind. 167; 13 Am. Rep 395 ...
Helmetag v. Miller ... 330
Hendricks v. Frank, 86 Ind. 278 ... 269
Henry v. St. Louis, etc., R. Co., 76 Mo. 288; 43 Am. Rep. 762 ... 797
Hersey v. Veazie, 24 Me. 9 ... 789
Hess v. Rader, 26 Gratt. 746 ... 620
Hewett v Swift, 3 Allen, 422 ... 497
Higgins v. Dewey, 107 Mass. 494; 9 Am. Rep. 63 ... 298
Highstown Bank v. Christopher, 40 N. J. L. 435 ... 713
Hill v. Boston, 122 Mass. 344; 23 Am. Rep. 332 ... 753
Hill v. Freeman, 73 Ala. 200 ... 331
Hill v. Buckingham Bank, 44 N. H. 567, 86
Hill v. Speer, 50 N. H. 253; 9 Am. Rep 205 ... 550
Hill v. Stevenson, 63 Me. 364; 18 Am. Rep. 231 ... 750
Hillman v. Newington, 57 Cal. 56 ... 767
Hills v. Hills, 8 M. & W. ... 750
Hilsdorf v. City of St. Louis, 45 Mo. 98, 99 ... 378
Hines v. Driver, 100 Ind. 315, 317 ... 682
Hicks v. Whittemore, 4 Met. 545 ... 323
Hoadley v. San Francisco, 50 Cal 275. 304, 305
Hoard v. Peck, 56 Barb. 202 ... 387
Hobbs v. London & S. W. R. Co., L. R., 10 Q. B. 111 ... 794
Hodges v. Greene, 28 Vt. 358 ... 116
Hoffman v. Ætna Ins. Co., 32 N. Y 405 ... 440, 443
Holbroid v. Atlantic Ins. Co., 2 Dill. 166 ... 137
Holbrook v. Armstrong, 1 Fairf. 31 ... 583
Holden v Fitchburg R. Co., 129 Mass. 268; 37 Am. Rep. 343 ... 595
Holden v. N. Y. & Erie Bank, 72 N. Y. 286 ... 10
Holker v. Poritt, L. R., 8 Exch. 107 ... 837
Hollida v. Hunt, 70 Ill 109; 22 Am. Rep. 63 ... 697
Holmes v. Mather, L. R., 10 Exch 261, 799
Holman v. Johnson, Cowp 348 ... 550
Holroyd v. Marshall, 10 H. L. Cas. 191.. 485
Holsman v Boiling Spring Co., 1 McCarter, 335 ... 772
Holt v. Green, 73 Penn. St. 198; 13 Am. Rep. 737 ... 538
Holt v. State, 38 Ga. 187 ... 299
Holten v Board, etc., 55 Ind. 194 ... 655
Holyoke Bank v. Goodman Paper Co., 9 Cush 576 ... 755
Homer v. Fish, 1 Pick. 439 ... 222
Hooper v. Edwards, 18 Ala. 280 ... 333
Hooper v. Wilkinson, 15 La. Ann. 497... 837
Hoover v. Wise, 91 U. S. 308 ... 98
Hosie's case, 7 Nat. Bank Reg. 601 ... 804
Hosmer v. Barrett, 2 Root, 156 ... 222
Hoth v. Peters, 55 Wis. 406 ... 595

	PAGE.
Hour v. Goulding, 116 Mass. 132...	702
House v. Fort, 4 Blackf 293.....	655
Houx v. Seat, 26 Mo. 178	533
Howard v. American Peace Society, 49 Me. 288..	725
Howard v Great Western Ins. Co. 109 Mass. 384	278
Howard v Ingersoll, 17 Ala. 788	282
Howe v. Whitney, 66 Me. 17	784
Howell v. Lineks, 87 N. Y. 637.....	784
Hubbard v. Wood, 1 Sneed, 279	171
Huckman v. Ferine, 3 M. & W. 505	282
Hudson v. State, 6 Tex. Ap. 565	635
Hull's case, Kelyng, 40	286, 288
Hume v. Conduitt, 76 Ind. 598...	667
Humphries v. Brogden, 12 Q. B 739 ..	277
Hunt v. Boonville, 65 Mo. 620; 27 Am. Rep. 299	381, 382
Hunt v. Field, 1 Stockton (N. J.) 36	671
Hunt v. Peake, Johns. Eng. Ch'y, 705.	581
Hunt v. Wyman, 100 Mass 200..... ...	584
Huntington v. McMahon, 48 Conn. 174.	569
Hurdman v. N. E. Ry. Co. 3 C. P. Div. 168.	837
Huss v. Central Railroad & Banking Company, 66 Ala 472.....	346
Hutchins v. Brackett, 22 N. H. 252 ..	336
Hutchins v. State Bank, 12 Metc. 425...	345
Hutchinson v. Lord, 1 Wis. 286	239
Hutchinson v. Western & Atlantic R. Co	359
Hutchinson v. York, Newcastle and Berwick R'y Co., 6 Eng. R'y and Canal cases, 436	280, 281
Hutson v. Merrifield, 51 Ind. 24 147.	232
Hoyt v. Jeffers, 30 Mich. 181..... ..	793
Hoyt v New York Life Ins. Co., 3 Bosw. 440	138. 140
Ill. C. Ry. Co. v. Hall, 72 Ill. 222 ...	209
Illinois Land and Loan Co. v. Bonner. 75 Ill. 313	682
Indiana, etc., Ry. Co. v. Hale, 66 Ind. 79	656
In re Alexandra Palace Co , 21 Ch. Div. 149	788
In re Barrell, 2 Bankr. 533	415
In re Capital Publishing Co., 18 Nat. Bank Reg 319...	108, 109
In re Chandler, 1 Lowell, 478..... ..	108
In re Clelland, L. R., 2 Ch. 466..... ...	760
In re European Bank, L. R., 5 Ch. 358.	712 713
In re Fearn's Will, 27 W R. 392	725
In re Janeway, 4 Nat. Bank Reg. 100 ..	804
In re Kenyon & Fenton, 6 Nat. Bank Reg. 238	108, 109
In re Klivert Trusts, L. R. 7 Ch. 170...	725
In re Lawson, 2 Bankr. 396	415
In re Marseilles Extension Railway, L. R., 7 Ch. 161.....	712, 713
In re Marston, 5 Benedict, 313 760,	761
In re National Funds Assurance Co., 10 Ch. Div. 118	789
In re Ship Warre, 8 Price, 269	485
In re Woodward, 8 Benedict, 553	760
In re Young, 11 R. I. 636	613
Insurance Co. v. Boon, 93 U S. 117. ...	89
Insurance Co. v. Newton, 22 Wall 32.	5
Insurance Co. v. Tweed, 7 Wall 44	798
Irish v. Smith, 8 S. & R. 573..... ...	656
Ivimey v. Stocker, L. R., 1 Ch. App. 396.	837
Jackson v. Dusen, 2 Johns. 144	323
Jackson v. Fairbanks, 2 H. Bl. 340 ..	402
Jackson v Hathaway, 15 Johns. 447...	519
Jackson v. Hoover, 26 Ind. 511. .	694
Jackson v. Phillips, 14 Allen, 539, 553..	46
Jackson v Ry. Co , 13 Lea. 491; 49 Am. Rep. 663	166
Jackson v. State, 15 Ohio, 652	107
Jacobs v. St. Paul, etc., R. Co., 20 Minn. 125	434
Jackson v. Updegraffe, 1 Rob. 107	619
Jackson School Tp v Farlow, 75 Ind. 118, 123.	682
James v. Richardson, 1 Ventr. 334. ..	649
Jameson v. Gregory, 4 Metc. (Ky.) 363.	584
James v. Reynolds, 2 Tex 251.....	756
Jardain v. Fairton Saving Fund Ass'n, 44 N. J. Law, 376	741
Jeffries v. Life Ins. Co., 22 Wall. 47. ..	230
Jencks v. Colman, 2 Sum 221..	544
Jerome v. Ross, 7 Johns Ch. 322	577
Jessup v. Hulse, 21 N. Y. 168...	235
Jewell v. Rock River Paper Co., 101 Ill. 57.	455
Job v. Collier, 11 Ohio, 422	222
Joel v. Morison, 6 Car. & P. 501	678
Johnson v. Jordan, 2 Metc 234	364
Johnson v McLane, 7 Blackf. 501.....	584
Johnson v. Oppenheim, 55 N Y 280 ..	101
Johnson v. Parkersburg, 16 W. Va 402.	423
Johnson v People, 31 Ill. 469; Code, 1876, §§ 4443 44.....	333
Johnson v. Thompson, 72 Ind. 167; 37 Am. Rep 152	656
Jones v. Bacon, 68 Me. 34; 28 Am. Rep. 1...	782
Jones v. Boyce, 1 Stark. 493	794
Jones v Clarke, 25 Gratt 658	619
Jones v. Green, 1 Wall. 330	670, 785
Jones v. Lake Shore & Mich. Southern R'y, 49 Mich. 573.	735, 737
Jones v Perry, 10 Yerg. 59, 81...	170
Jones v. Raines, 35 La Ann. 996.....	111
Jordan v. Ala. Gt. So. R. Co., 74 Ala. 85.	357
Jordan v. Woodward, 38 Me. 424.	23
Joslin v. Grand Rapids Ice Co., 50 Mich. 516; 45 Am. Rep. 54	191
Joselyn v. Pierson, L. R., 7 Exch. 127.	761
Kane v, Bloodgood. 7 Johns. Ch. 90 ..	788
K. P. R'y Co. v. Cutter, 16 Kans. 568 .	525
Keeler v. Niagara Ins. Co., 16 Wis. 523.	442
Keeney v. Horne, 71 N. Y. 396; 27 Am. Rep. 69	443
Kehlor v. Lademann, 11 Mo. App. 550.	455
Keller v. Tracy, 11 Iowa, 530	438
Kellogg v. C & N. W. R. Co., 26 Wis. 223; 7 Am. Rep 69	792
Kellogg v. Schuyler, 2 Denio, 78	610
Kellogg v. Slauson, 15 Barb. 56; 11 N. Y. 302	237, 238
Kelly v. Lane, 42 Barb. 594	671, 672
Kelsey v. Union Life Insurance Company, 35 Conn. 225.	228
Kennedy v. Green, 3 Myl. & K. 699	712
Kerman v. Howard, 23 Wis. 108	146
Kerr v. Merchants' Exchange Co., 3 Ed. Ch. 315	100
Kerrigan v. Rautigan, 48 Conn. 17	605
Keyes v. Little York Gold Washing Co. 53 Cal. 724	767, 768
Keystone Bridge Co v Newbury, 96 Penn. St. 246; 42 Am. Rep. 543...	595
Keystone Bridge Co. v. Summers, 13 W. Va. 476.	577
Kilbourn v. Thompson, 103 U. S. 168. 54,	60 61
King v. Fleming, 72 Ill. 21; 22 Am. Rep. 131...	332
Kingsbury v. Whitaker, 32 La. Ann. 1058; 36 Am. Rep. 278	322
Kinney v. Bradlee, 117 Mass. 321	584
Kipper v. Glaucey, 2 Blackf. 356 ...668,	671 673
Kirkpatrick v. Ward, 5 Lea. 434..	189
Knapp v Beattie, 70 Me. 410.....	740

PAGE.

Knapp v. Knapp, 134 Mass. 253 781
Knox v. Rives, 14 Ala. 249 335
Kohs v. Minneapolis, 22 Minn. 159 182
Kramer v. Stock, 10 Watts, 115 466
Kugler v. Wiseman, 20 Ohio, 361 88

Lacefield v. State, 34 Ark. 275; 36 Am. Rep 8 209
Lade v. Shepherd, 2 Str. 1004 519
La Fayette Ins. Co. v. French, 18 How. 404 346
Lake v. Milliken, 62 Me 240; 16 Am. Rep. 456 797
Lake Erie & W. R. Co v. Fix, 88 Ind 381; 45 Am. Rep. 461 352
Lalor v. Chicago, Burlington & Quincy R., 52 Ill 401; 4 Am. Rep. 616 735
Lambeth v. N. C. R'y Co., 66 N. C 494; 8 Am. Rep. 508 332
Lampson v. Hobart, 28 Vt. 697 120
Land Grant R'y v. Comm'rs of Coffey Co., 6 Kans. 245 525
Landrum v. Knowles, 22 N. J. Eq. 594. 140
Langdon v. Union Mut. Life Ins. Co., 22 Am. Law Reg 385 141, 142
Lane v. Atlantic Works, 111 Mass. 136. 797
Lane v. Cotton, 1 Ld Raym. 646 335
Lantz v Maffett, 102 Ind. 23 666
Larkin v. Avery, 23 Conn 304 533
Laugher v. Pointer, 5 B. & C. 547 193
Laurans v. R. Co., 15 Minn. 49; 2 Am. Rep. 102 352
Law v. London Policy Co., 1 Kay & Johns. 223 668
Lawler v. White, 27 Tex. 250 837
Lawrence v. G. W. R. Co., 16 Q. B. 643.
Lawrence v. Mt Verna, 35 Me. 100 746
Leary v. Laflin, 101 Mass. 334 126
Ledgerwood v. Gault, 2 Lea, 643 180
Leggott v. Gt. N. R'y Co., 1 Q. B. D. 604; 17 Eng. Rep. 258 31
Lehman v. McBride, 15 Ohio St. 573 ... 91
Leland v. Marsh, 16 Mass. 391 755
Lemon v. Newton, 134 Mass 476 718
Lemon v. Phœnix Mutual Life Ins. Co., 38 Conn. 294 141, 147
Lemont v. Washington & Georgetown R. Co., 1 Mackey, 180; 47 Am. Rep. 238 644
Lennahan v. O'Keefe, 107 Ill. 620 781
Leonard v. White, 7 Mass. 6 362
Letson v. Kenyon, 31 Kans. 301 401
Leveridge v. Hoskins, 11 Mod. 257 263
Lewallen v. State, 6 Tex. App. 745. 635
Lewis v. McCabe, 49 Conn. 141; 44 Am. Rep. 217 583
Lewis v. Phœnix Mutual Life Ins. Co., 39 Conn. 100 138
Lindley v. Cross, 31 Ind. 106 670
Linn v. Ross, 10 Ohio, 412 100
Litchfield v. Hutchinson, 117 Mass. 195. 285
Littlewood v. Mayor, etc., 89 N. Y 24; 43 Am. Rep. 271 31, 33
Live Stock Ass'n v. The Crescent City, etc., 1 Abb. (U. S.) 398 40
Livie v. Janson, 12 East, 648 794
Livingston v. McDonald, 21 Iowa, 160 .. 857
Longmeid v. Holliday, 6 Exch. 761 .. 715
Loomis v. Eagle Life & Health Ins. Co., 6 Gray, 396 137, 138, 247, 255
Lord v. Dale, 12 Mass. 115 137, 138, 317
Lord v. Lord, 23 Conn. 327 600
Lord v. Steamship Co., 102 U. S. 541 .. 198
Loring v. Bacon, 4 Mass. 574 276
Loring v. Brodie, 134 Mass. 453. 712
Loring v. Mansfield, 17 Mass. 394. 222
Lorman v. Benson, 8 Mich. 32 72
Lowe v. Buchanan, 51 N. Y. 476; 10 Am. Rep. 623 799

PAGE.

Loshbaugh v. Birdsall, 90 Ind. 466 656
Loudenback v. Collins, 4 Ohio St. 251 .. 88
Love v. Wells, 25 Ind. 503 382
Lucas v. Bishop 364
Luch's Appeal, 44 Penn. St. 519 477
Lunt's case, 6 Me. 413 752
Luttrel's Case, stated in Hale v. Hale, 1 rrec. Ch 50 244
Lynch v. Murdin, 1 Ad. & El (N. S.) 29, 15
Lyons v. Erie R'y Co, 57 N. Y. 489. ... 89
Lyon v. Lyon, 21 Conn. 185 569
Lyon v. McLaughlin, 32 Vt. 423. 772
Lyon v. Blatner, cited in Woodburn v. Mosher, 9 Barb. 255 237

Macomber v. Parker, 14 Pick. 497 492
Macon v. Sheppard, 2 Humph. 335 180
Macy v. Whaling Ins. Co., 9 Metc. 354 .. 278
Maddox v. Maddox, 11 Gratt. 804 327
Maghee v. Kellogg, 24 Wend. 32 222
Maguire v. Dinsmore, 70 N. Y. 410; 26 Am Rep. 608 338
Maitland v. Bank, etc., 38 L. J. Eq. 363 . 660
Manier v. State, 6 Baxt. 600 156
Mann v. Cooke, 20 Conn. 178 453, 455
Manning v. Brown, 1 Fairf. 49 312
Manville v. Cleveland & Toledo R., 11 Ohio St. 417 280
Many v. Beekman Iron Co., 9 Paige, 188. 786
Marble v. Marble, 36 Mich. 386 615
Marcott v. Marquette, etc., R. Co., 47 Mich. 7 792
Marcy v. Clark, 17 Mass. 330, 335 ...753, 755
Marienthal v. Mosler, 16 Ohio St. 566 .. 399
402
Marler v. St. Paul, etc., Ry. Co, 31 Minn. 351; 47 Am Rep. 793 378
Marion Sav. Bank v. Dunkirk, 54 Ala. 471 356
Marr v. Gilliam, 1 Cold. 489. 171
Marsellis v. Thalhimer, 2 Paige, 35 ... 244
Marsh v. Burroughs, 1 Woods, 470 ... 754
Marshall v. Stewart, 33 E. L. & E 1 ... 281
Marshall v. Welwood, 38 N. J. Law. 339; 20 Am. Rep 394 799
Martin v. Adams, 104 Mass. 262 384
Martin v. Bradley, 1 Caines, 124 26
Martin v. Holland, 87 Ind. 105 670
Martin v. Michael, 23 Mo. 50 670
Mary Clark's case, 1 Blackf. 122 30
Mason v. Caldwell, 5 Gilm. 196. 311
Mason v. Waite, 17 Mass. 558 805
Masonic Mut. Benefit Ass'n. v. Beck, 77 Ind. 208 5
Matter of Diez, 50 N. Y. 93 47
Matter of Jacobs, 98 N. Y. 98; 50 Am. Rep. 636 40
Matter of Schouler, 134 Mass. 426 45
Mattingly v. Sutton, 19 W. Va. 19 222
Maxwell v. Featherston, 83 Ind. 339 ... 646
Mayer v. Walter, 64 Penn St. 289 466
Mayor v. Chadwick, 11 Ad. & E. 571 .. 837
Mayor v. Dearmon, 2 Sneed. 104 374
Mayor, etc., of London v. Bolt, 5 Ves. 129 572
Mayor, etc., of New York v. Miln, 11 Peters, 102 696
Mayor of Richmond v. Judah, 5 Leigh, 305 222
M. & C. R. Co. v. Chastine, 54 Miss. 503. 434
436
McAllister v. Bodkin, 76 Va. 814 620
McAllister v. Burlington, etc., R. Co, 64 Iowa, 395 206
McAlpine v. Sweetzer, 76 Ind. 78 667
McCarthy v. R. Co., 18 Kans. 46 525
McCartney v. Bostwick, 32 N. Y 53 .. 673
McClary v. Sioux City, etc., R. Co., 3 Neb. 44; 19 Am. Rep. 631. 796

PAGE.

McCluskey v. Providence Washington Ins. Co., 126 Mass. 306 247
McCombs v. State, 8 Ohio St. 643 504
McCormick v. Bishop, 28 Iowa, 233 276
McCormick v. Kansas City R., 70 Mo. 359; 35 Am. Rep. 435 537
McCormick v. Webster, 89 Ind. 105 667
McCowen v. Whitesides, 31 Ind. 235 576
McCray v. Lipp, 35 Ind. 116 646
McCrea v. Marsh, 12 Gray, 211 699
McCully v. Clark, 40 Penn. St. 406 470
McDermutt v. Strong, 4 Johns. Ch. 687, 689 673
McDonald v. Mallory, 77 N. Y. 546; 33 Am. Rep. 664 31
McDonald v. Mass. General Hospital, 120 Mass. 432; 21 Am. Rep. 529 500
McDonald v. Napier, 14 Ga. 89 222
McDowell v. Cochran, 11 Ill. 31, 33 674
McElroy v. Kansas City, 21 Fed. Rep. 257 423
McElwain v. Willis, 9 Wend. 548, 560, 566. 674
McEwen v. Troost, 1 Sneed, 191 179
McGatrick v. Wason, 4 Ohio St. 566 333
McGill v. State, 34 Ohio St. 228 91
McGrath v. Mervin, 113 Mass. 467; 17 Am. Rep. 117 334
McIntire v. Parks, 3 Metc. 207 550
McKenney v. Dingley, 4 Greenl. 173 396
McKee v. Judd, 12 N. Y. 622 30
McKee v. Phœnix Ins. Co., 28 Mo. 383, 137
McLanahan v. Reeside, 9 Watts, 511 477
McLaughlin v. Sandusky, 17 Neb. 110 420
McMillen v. Anderson, 95 U. S. 37 757
McMinn v. Whelan, 27 Cal 300 670
McVicker v. Beedy, 31 Maine, 314 665
McWilliams v. Nicely, 2 S. & R. 518 845
M. & E. Ry. Co. v. Kolb, 73 Ala. 396 352
Meacham v. Stearns, 9 Paige, 398 237
Meldrum v. Snow, 9 Pick 441 584
Meux v. Anthony, 11 Ark 411, 418 673
Meux v. Howell, 4 East. 13 235
Mercantile Ins. Co. v. Calebe, 20 N. Y 173 731, 732
Merchants' Bank v. Cook, 4 Pick. 414 .. 753
Merchants' Bank v. Paine, 13 R. I. 592. 785
Mer. Bank v. State Bank, 10 Wall. 604 .. 357
Merchants' Nat. Bk. v. Paine, 13 R. I. 592 673
Meriweather v. Garrett, 102 U. S. 472 . 758
Merrick v. Brainard, 38 Barb. 574 686
Merrifield v. Lombard, 13 Allen, 18..772, 773, 775
Merrill v. New England L. Ins. Co., 103 Mass. 245; 4 Am Rep. 548 346
Merrill v. Suffolk Bank, 31 Me 57 755
Messenger v. Penn. R. Co., 36 N. J. L. 407 429
Metallic Compression Co. v. Railroad Co., 109 Mass 277; 12 Am. Rep. 689 .. 797
Metropolitan Nat. Bk. v. Lloyd, 90 N. Y, 530 9
Meyerstein v. Barber, L. R. 2 C. T. 38... 489
Michael v. Stanton, 3 Hun, 463 193
Miller v. Barber, 66 N. Y. 559 396
Miller v. Davidson, 8 Ill. 518 522, 673
Miller v. Eagle Life Ins. Co., 2 E. D. Smith, 248 140
Miller v. Miller, 64 Me 489 780
Miller v. Mut. Life Ins. Co., 31 Iowa, 266; 7 Am. Rep 122 232
Milliken v. Thorndike, 103 Mass. 382. . 285
Milliken v. Whitehouse, 49 Me. 527 754
Mills v. Block, 30 Barb. 549 671
Mills v. Winter, 94 Ind. 329 655
Milnes v. Duncan, 6 Barn. and Cres. 671 225
Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469 792, 796

PAGE.

Minor v. Rogers, 40 Conn. 512; 16 Am. Rep. 69 604
Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512 375
Missouri Valley Life Ins. Co. v. Sturges, 18 Kans. 93; 26 Am. Rep. 761 144, 317, 318
Mitchell v. Carder, 21 W. Va. 277 319
Mitchell v. Seipel, 53 Md. 251; 36 Am. Rep. 104 375
Mitchell v. Union Life Ins. Co., 45 Me. 104 137
Mitchell v. Winslow, 2 Story, 681.. 485, 491
McKenzie v. McLeod, 10 Bing. 385 288
Moffatt v. Fisher, 47 Iowa, 473 467
Mohawk Bridge Co. v. Utica & Schenectady R. Co., 6 Paige, 563 577
Moir v. Brown, 14 Barb. 39 237
Mollan v. Griffith, 3 Paige, 402 159
Moore v. Abbott, 32 Me 46 165
Moore v. Dole, 135 Mass 508 377
Moore v. Fitchburg Railroad Corporation, 4 Gray, 465 497
Moore v. Mayor, 1 Stew. 284 338
Moore v. Protection Ins. Co., 29 Me 97; 48 Am. Dec. 514 5
Moore v. Townshend, 4 Vroom, 284.... 391
Mooers v. Railroad, 58 Me. 279 785
Morgan v. Bowman, 22 Mo. 538. ... 378
Morley v. Rennoldson, 2 Hare, 571... 327
Morrell v. Trenton Mutual Life Ins. & Fire Ins. Co., 10 Cush. 282 139, 140
Morris v. C. B. & Q. Ry. Co., 45 Iowa, 29 208
Morris v. East Haven, 41 Conn. 252... 746
Morris v. Platt, 32 Conn 75. 199
Morrison v. Brand, 5 Daly, 40 237
Morrow v. Weed, 4 Iowa, 77 667
Morse v. Machias Water Power Co., 42 Me 127, 128 771
Morton v. Chandler, 7 Me. 45 222
Moses v. Pittsburgh, etc., R. Co., 21 Ill. 522.. 576
Moss v. Moss, 2 Ired. 35 389
Moss v. Sweet, 3 Eng. & L. Eq. 311..584, 589
Mostyn v. Fabrigas, Cowp. 161; 1 Smith Lead Cas. (8th ed.) 162. 263
Motley v. Sargent, 119 Mass. 231. .. 701
Moulton v. Sanford, 51 Me. 127. 166
Mowry v. Home Life Ins. Co., 9 R. I. 346. 138
Muller v. Eno, 14 N. Y. 597..... 64, 65
Munsey v. Joest, 74 Ind. 409 667
Munn v. Dupont 466
Munn v. Illinois, 94 U. S. 113... 199, 409, 427 606
Munson v. Atwood, 30 Conn. 102 .. . 556
Murphy v. Gloucester, 105 Mass. 470... 260
Murray v. Currie, L. R., 6 C. P. 24..... 131
Murray v. Hoboken Land Company, 18 How. 272..... 757
Murray v. State, 11 Lea, 218 761
Musgrave v. Parry, 2 Vern. 710. 244
Mussey v. Noyes, 26 Vt. 462, 470 239
Mutual Life Ins. Co. v. Allen, 138 Mass. 24 137, 143, 316, 363
Myers v. Gemmel, 10 Barb. 527.. 101

Nash v. Church, 10 Wis. 244 666
Nassau Gas-light Co. v. City of Brooklyn, 89 N. Y. 409 110
Nathan v. Whitlock, 9 Paige, 152 563
Nat. Bank v. Ins Co., 95 U. S 673.. .. 280
National Security Bank v. Cushman, 121 Mass 490.. 712
Nebraska City v. Lampkin, 6 Neb. 27 . 421
Needham v. Grand T. R. Co., 38 Vt. 294 24
Neenan v. Smith, 50 Mo. 525 372
Neidefer v. Chastain, 71 Ind. 363; 36 Am. Rep. 198 666

PAGE.

Neil v. Case, 25 Kans. 510; 37 Am. Rep. 259 ... 418, 419, 420
Nelson v Cushing, 2 Cush. 521 ... 497
Nelson v. Davis, 35 Ind 474 ... 646
New Albany v. Burke, 11 Wall. 96 ... 458
Newcomb v. Newcomb, 13 Bush, 544 ... 668
Newe v. Gt. W. R'y Co. of Canada, 19 Mich. 336 ... 343
New England Mut. L. Ins Co. v. Woodworth, 111 U. S. 138 ... 346, 347
Newhall v. Ireson, 8 Cush. 595 ... 701
Newis v. Lark, Plowd 412 ... 560
Newton v. Harland, 1 Man. & Gran. 644. ... 187
New York, Lake Erie & Western Railway Co. v. Haring, 47 N. J. L. 137 ... 358
N. Y. & N. H R. Co. v. Schuyler, 34 N. Y 30 ... 357
Nevins v. City of Peoria, 41 Ill. 502 ... 837
Nichols v. McEwen, 21 Barb. 65; 17 N. Y 22 ... 238
Nicholson v Leavitt, 4 Sandf. 252; reversed, 6 N. Y. 510 ... 236, 237
Norris v. Commonwealth, 3 Casey, 494. 762
Northrup v Hale, 73 Me. 66. ... 750
Norton v. Sewell, 106 Mass. 143; 8 Am. Rep. 298 ... 715
Norton v. Volentine, 14 Vt. 239 ... 264
Nulton v. Clayton, 54 Iowa, 425 ... 456
Nuttall v. Bracewell, L. R., 2 Exch. L. ... 837

O'Brien v. Coulter, 2 Blackf. 421 ... 673, 674
O'Brien v Norwich, etc., R. Co., 17 Conn 395 ... 576
O'Brien v. Same, 53 Barb 568 ... 453
O'Connell v. Bryant, 121 Mass 557 ... 700
O'Connor v. Adams, 120 Mass 427 ... 735
O'Donnell v. Allegheny Valley R. Co., 59 Penn. St 239 ... 281
Offutt v King, 1 McArthur, 312 ... 674
Ogburn v. Connor, 46 Cal. 346; 13 Am. Rep. 213 ... 837
Ogden v Jennings, 62 N Y. 526, 531 ... 364
Ogden v. Peters, 15 Barb 564 ... 240
Ogden v. Saunders, 12 Wheat. 270 ... 752
O'Hagan v. O'Hagan, 4 Iowa, 509 ... 780, 781
Ohio, etc., R'y Co. v. Dickerson, 59 Ind. 317 ... 687
Ohio & Mississippi R. Co. v. Muhling, 30 Ill. 9. ... 435
Olmsted v. Keyes, 85 N. Y. 601. 137, 139, 142, 143, 144, 145
Olmsted v. Loomis, 9 N. Y. 432 ... 772
Oppenheim v. Pittsburgh, etc., Ry. Co., 85 Ind 471. ... 667
Orcutt v. Nelson, 1 Gray, 536 ... 550, 588
Orr Ewing v. Colquhoun, 2 App. Cas. 839, 856. ... 264
Osborne v. Ins. Co., 51 Vt. 278 ... 342
Osborne v. People, 2 Park. 563 ... 394
Osgood v. King, 42 Iowa, 478 ... 454, 455
Ottumwa Lodge v. Lewis, 34 Iowa, 67; 11 Am. Rep. 135 ... 276
Owen v Moody, 20 Miss. 79 ... 447

Packard v. Getman, 4 Wend. 613 ... 338
Page v. Bucksport, 64 Me. 51; 18 Am. Rep. 239 ... 89, 90
Page v. Olcott, 28 Vt. 465; 468, 469 ... 239
Paine v. Wheeler, 93 Penn. St. 232 ... 477
Palmer v. Merrill, 6 Cush. 282 ... 247, 254
Palmer v. Railroad, 3 S. C. 580; 16 Am. Rep. 730 ... 352
Palmer v. Wetmore, 2 Sandf. 316 ... 101
Panton v. Isham, 3 Lev. 359. ... 290
Paramore v. Lindsey, 63 Mo. 67. ... 418
Pardee's Appeal, 100 Penn. St. 408 ... 111
Paris v. Paris, 10 Ves. 185 ... 513
Parish v. Lewis, Freem. (Miss.) 290, 306 574
Parke v. Com. Ins. Co. 44 Penn. St. 422. 343

PAGE.

Parker v. Boston, etc., Co., 109 Mass. 449; Best Ev. 494 ... 656
Parker v. Great Western R. Co., 6 E. & B. 77 ... 106
Parker v. Johnson, 25 Ga. 576 ... 557
Parker v. Middlebrooks, 24 Conn. 207 338
Parker v. Peters, 3 Leg. Rep. 12 ... 171
Parker v. Winnipiseogee Lake Co, 2 Black. 552 ... 771
Parker's Adm'rs v. Frambes, 2 N. J. L. 156 ... 466
Parks v. Morris Axe and Tool Co., 54 N. Y. 586 ... 65
Parrott v. Barney, Deady, 405; on appeal, 1 Sawy. 423 ... 292
Parrott v. Wells, 15 Wall. 524 ... 799
Patterson v. Chicago, etc., R. Co., 75 Ill. 588 ... 577
Patterson v. Kentucky, 97 U. S. 101 ... 696
Patterson v State, 66 Ind. 185 ... 636
Paulling v. Watson, 26 Ala. 205 ... 222
Pawling v. Bird, 13 Johns. 192 ... 665
Paxton v. Boyer, 67 Ill. 132; 16 Am. Rep. 615 ... 799
Payne v. Commonwealth, 1 Metc. (Ky.) 370 ... 625
Peabody v. Flint, 6 Allen, 52 ... 788
Pearce v. M. & Ind. R Co., 21 How. 441. 355
Pearsall v. Post, 20 Wend. 111 ... 516
Peay v Morrison's Executors, 10 Gratt. 149 ... 673
Peck v. Denniston, 121 Mass. 17 ... 700, 701
Peck v. Woodbridge, 3 Day, 36 ... 222
Pelk v. Railway Co., 94 U. S. 164 ... 200
Pendleton v. Perkins, 49 Mo. 565 ... 671, 673
Pennoyer v. Neff, 95 U. S. 714, 727 ... 696
Pennsylvania Co. v. Hoagland ... 798
Penn. Mut. Life v. Wiler, 100 Ind. 92; 50 Am. Rep. 769 ... 5
Penn R. Co. v. Brooks, 57 Penn. St. 346. 434
Penn R. Co. v. Kerr, 62 Penn. St. 653. 15
18
Penn. R. Co. v. Ogier, 35 Penn. St. 71 .. 470
Pennsylvania Railroad Co. v. Patterson, 73 Penn. St. 491. ... 479
Penn. R. Co. v. Zebe, 33 Penn. St 318. 470
Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 9 ... 198, 408
People v. Albany & Vt R., 24 N. Y. 261, 410
People v. Allbez, 49 Cal 452 ... 302
People v. Babcock, 11 Wend. 587 ... 194
People v. Benson, 6 Cal 221 ... 503
People v Corporation of Albany, 11 Wend 539 ... 643
People v. Cunningham, 1 Denio, 524. 643
People v. Dayton, 55 N. Y. 390 ... 57
People v. Gibbs, 9 Wend. 29 ... 26, 29
People v. Knickerbecker Ice Co., 99 N. Y. 181 ... 110
People v. Lamb, 2 Keyes, 364 ... 636
People v. Learned, 5 Hun, 626 ... 60
People v. Manhattan Gas Light Co., 45 Barb 316 ... 409
People v. Murray, 10 Cal. 309 ... 635, 636
People v. N. Y. Floating Dock Co., 63 How. Pr. 451; 11 Abb. N. C 40. ... 112
People v. Pope, 53 Cal. 437 ... 304
People v. Saunders, 4 Park Cr. 196 ... 302
People v. Supervisors, 16 N. Y. 432 ... 57
People v. Supervisors, 70 N Y 228. 57
People v. Tioga Com. Pleas, 19 Wend. 73. 28, 30, 31
People v. Utica Ins. Co., 15 Johns. 380, 381 ... 372
People v. Wood, 3 Park. 681 ... 394
Peoria M. & F. Ins. Co. v. Frost, 37 Ill. 333 ... 686
Peoria, etc., Ry. Co. v. Schertz, 84 Ill 135 ... 577

PAGE.

Perkins v. Douglass, 20 Me. 317..... 584
Perkins v. Fayette, 68 Me. 152; 28 Am. Rep. 84..... 166
Perley v. Eastern R. R. Co., 98 Mass. 99. 588
Perrott v. Shearer, 17 Mich. 48 686
Perry v. R. Co., 29 Kans. 420 525
Peterson v. Chemical Bank, 32 N. Y. 21 447, 448
Peterson v. Whitebreast Coal and Mining Co., 50 Iowa, 674; 32 Am. Rep. 143..... 595
Pettibone v. Hamilton, 40 Wis. 402..575, 577
Phelan v. Hazard, 5 Dill. 45 458
Phelps v. Holker, 1 Dall. 261 665
Philadelphia & Reading R.Co. v. Derby, 14 How. 468 282, 499, 677
Phillips v. Bordman, 4 Allen, 147..... 581
Phillips v. County Com., 122 Mass. 258 . 717
Phillips v. Merrimack Ins. Co., 10 Cush. 350 248
Phillips v. Middlesex, 127 Mass. 262.... 717
Phillips v. People, 57 Barb. 354..... 306
Phœnix Ins. Co. v. Erie & West. Trans. Co., 10 Biss. 18 731
Pickering v. Templeton, 2 Mo. App. 524 455
Pickett v. Leonard, 34 Barb. 193....399, 402, 403
Piedmont & A. Life Ins. Co. v. Young, 58 Ala. 476 352
Pierce v. Brewster, 32 Ill. 268..... 239
Pierce v. Dyer, 109 Mass. 374; 12 Am. Rep. 716..... 272, 274, 276
Pierce v. Five Cents Sav. Bank, 129 Mass. 425; 37 Am. Rep. 371. 750, 751
Pierce v. Fuller, 8 Mass. 102..... 127
Pierce v. Nashua Ins. Co., 50 N. H. 297; 9 Am. Rep. 235 440, 443
Pierson v. People, 79 N. Y. 424; 35 Am. Rep. 524..... 3, 5
Pitcher v. N. Y. Life Ins. Co., 33 La. Ann. 332; Bliss Life Ins., §§ 317-337.... 147
Pinckard v. Woods, 8 Gratt. 140 619
Pipin v. Sheppard, 11 Price, 400..... 715
Pittsburgh & Connellsville R. Co. v. Clarke, 29 Penn. St. 146..... 456
Pittsburgh, Cin. & St. Louis Ry. Co. v. Nuzum, 60 Ind. 141; 19 Am. Rep. 703.. 624
Pittsburgh, etc., R. Co v. Staley, 41 Ohio St. 118; 52 Am. Rep 165
Pleasant v. State, 15 Ark. 624. 504
Plummer v. State, 4 Tex. App. 310; 30 Am. Rep. 165 799
Pollard v. Bailey, 20 Wall. 520 754
Pollen v. Brewer, 97 E. C. L. R. (7 Com. Bench, N. S.). 371 187
Pollett v. Long, 56 N. Y. 200 15, 17
Pomery v. Partington, 3 T. R. 674 506
Poole's case, 9 Ch. Div. 322 788
Porter v. Seiler, 23 Penn. St. 424; 62 Am. Dec. 341 184
Porter v. Whitman, 17 Me. 294..... 771
Porter v. Williams, 9 N. Y. 142..... 237
Post v. Kearney, 2 N. Y 394.. 169
Post v. Mackall, 3 Bland. 486 152
Postlewait v. Howes, 3 Iowa, 366, 383.. 674
Potts v. Imlay, 4 N. J. L. 330..... 466
Powell v. Glenn, 21 Ala. 458 649
Powers v. Dennison, 30 Vt. 752..... 532
Powers v. Guardian F. & L. Ins. Co., 136 Mass. 108; 49 Am. Rep 20 443
Powers v. Northeast Mut. Life Ass'n, 50 Vt 630..... 230
Pratt v. Lewis, 39 Mich. 7..... 574, 575
President, etc, of the Merchant's Bank v. Spalding, 12 Barb. 302..... 550
Price v. Nesbit, 1 Hill Ch. 415..... 173
Price v. Price, 75 N. Y. 244; 31 Am. Rep. 463 28
Priest v. Groton, 105 Mass. 350 397

PAGE

Prince v. Case, 10 Conn. 375. 528
Prior v. Quackenbush, 29 Ind. 475..... 650
Provident Life Ins. Co. v. Barnes, 141
Provident Ins. Co. v. Baum, 29 Ind. 236. 141, 255
Pruner v. Pendleton, 75 Va. 516; 40 Am. Rep. 738 643
Puffer v. Orange, 122 Mass. 380; 23 Am. Rep. 368..... 260
Pullman Palace Car Co. v Barker, 4 Col 344; 34 Am Rep. 89 794
Putnam v. Broad'y, etc., R. Co., 55 N. Y. 108; 14 Am. Rep. 190 15
P. W. & B. R. Co. v. Quigby, 21 How. 202..... 357
Pyer v. Carter, 4 H. & N. 916..... 274
Quarman v. Burnett, 6 Mees. & W. 499. 198
Queen v. Dossett, 2 Cox C. C. 243 392
Queen v. Francis, L. R., 2 C. C. Rev. 128; 12 Cox C. C. 612..... 391
Queens v. Holmes, L. R., 1 C. C. Res. 304; 12 Cox C. C. 137; 1 Moak's Eng. R. 226..... 502
Queen v. Spilling, 2 Mood. & Rob. 107.. 267
Quimby v. Vanderbilt, 17 N. Y. 306 350
Quin v. Brown, 14 R. I 524..... 674
Quinn v. Heisel, 40 Mich. 576..... 830
Quinn v Power, 87 N. Y. 535; 41 Am. Rep. 392 677
Railroad Co. v. Commissioners, 1 Ohio St. 77 91
Railroad v. Fort, 17 Wall. 553 735
Railroad Co. v. Harris, 12 Wall. 65 342
Railroad Co. v. Helleman, 13 Wr. 60.... 470
Railroad Co. v. Husen, 95 U. S. 465. ... 696
Railroad v. Lewton, 20 Ohio St. 401 . 70
Railroad Co. v. Maryland, 21 Wall. 456. 195
Railroad Co. v. Statham, 42 Miss. 607.. 544
Railroad Co. v. Transp. Co., 25 W. Va. 324 193
Railroad Co. v. Weber, 18 Penn. St. 157; 18 Am. Rep. 467 470
Railroad Co. v. Woelpper, 64 Penn. St. 366 484
Rameshur Pershad Narin Singh v. Koonj Behart Pattuk, 4 App. Cas. 121 837
Raud v. Hubbard, 4 Metc. (Mass.) 252.. 447
Rapalee v. Stewart, 27 N. Y. 310... 237
Rapp v. Matthias, 35 Ind. 332..... 649
Raun v. Reynolds, 18 Cal. 275 282
Rawlins v. Desborough, 2 Mood. & R. 328, 333 232
Rawles v. Amer. Mut. Life Ins. Co., 36 Barb. 357 229
Rawls v. American Mutual Life Ins. Co , 27 N. Y. 282.... 159, 142, 143, 255
Rawstron v. Taylor, 11 Exch. 369..... 837
Read v. Cambridge, 126 Mass. 427 717
Read v. Pennsylvania Railroad, 15 Vroom, 280..... 288
Reardon v City of San Francisco. 6 Pac R. 325, 328 422, 423
Red River Roller Mills v. Wright, 30 Minn. 249; 44 Am. Rep. 194..... 776
Reed v. Head, 88 Mass. 177.. 512, 513
Reed v N. Y. Cent. R. Co., 45 N. Y. 574. 229
Reedy v. Purdy, 41 Ill. 279 187
Rees v. Watertown, 19 Wall. 107..... 758
Reese v Mutual Benefit Life Ins. Co , 23 N. Y. 516-526 135, 136
Reeves v. Bank, 8 Ohio St. 465..... 95
Reeves v. Capper, 5 Bing. N. C. 136. 488, 489
Reeve v. Long, 1 Salk. 227..... 244
Reeves v. Railroad Co., 30 Penn. St. 454. 470
Reg. v. Cooper, 1 Q. B. Div. 19 389
Reg. v. Holt, 8 Cox C. C. 411.. 389
Reg. v. Richardson, 2 F. & F. 343 392

PAGE.

Regina v. Chamberlain, 10 Cox C. C. 486 268
Regina v. Crick, 1 F. & F. 519 267
Regina v. Crook, 1 F. & F. 521 267
Regina v. Dalloway, 2 Cox C. C. 273... 269
Regina v. Garner 3 F. & F. 681 393
Regina v. Lynch, 1 Cox C. C. 361 210
Regina v. Macleod, 12 Cox C. C. 534.... 268
Regina v. Markuss, 4 F. & F. 356 267
Regina v. Morris, 10 Cox C. C. 480. 302
Regina v. Packard, C. & M. 236 . 270, 271
Regina v. Prince, L. R. 2 C. C. 154..... 270
Regina v. Robins, 2 Moody & Rob. 512, 503
Regina v. Smith, 11 Cox C. C. 210 271
Regina v. Smith, 33 Eng. L. & Eq. 567. 210
Regina v. Swindall, 2 C. & K. 230..... 269
Regina v. West, 2 C. & K. 784; 2 Cox C. C. 500 243
Regina v. Whitehead, 3 C. & K. 202 ... 267
Reif v Union Mutual Life Ins. Co., 17 Ins. Chron. 13 138
Reif v Rupp, 3 W. & S. 21 434
Rensselaer & N. W. Plank R. Co. v. Burton, 16 N. Y. 457..... 456
Re Odell, 17 Bankr. Reg. 73!..... 761
Reserve Life Ins. Co. v. Kane, 81 Penn. St 154; 22 Am. Rep. 741..... 137, 138
Re Sherwood, 17 Bank. Reg. 102... 761
Reskham v. Brown, 4 Thomp. 174..... 222
Rex v. Burton, 1 Str 481 268
Rex v. Hodgson, 1 Russ. & Ry. 211. 502, 503
Rex v. Hogg, 4 C. & P. 364; 19 Eng. C. L. 420 392
Rex v. Long, 4 C. & P. 398, 423, 436. ... 267
Rex v. Neal, 7 C. & P. 168 315
Rex v. Noakes, 5 Car & P. 326..... 316
Rex v. Senior, 1 Moody, 346..... 267, 243
Rex v. Simpson, Willcock, Need. Prof. pt. 2. ccxxvii 297
Rex v. Spiller, 5 C. & P 333..... 267
Rex v. Timmins. 7 C. & P. 499..... 269
Rex v. Voke, 1 Rus. & Ry. 531 392
Rex v. Williamson, 3 C. & P. 635..... 267
Rex v. Wilson, 8 T. R. 364 186
Rex v. Winkworth, 4 C. & P. 444; 19 E. C. L. 465 392
Rhode Island v. Massachusetts, 12 Pet. 657 666
Rice v. Curtis, 32 Vt. 460..... 664
Rice v. Des Moines, 40 Iowa, 638... 89
Rice v. Ruddiman, 10 Mich. 139 72
Richards v. Rose, 9 Exch. 218. 272, 274, 275
Richardson v. Kentucky Grangers' Benefit Soc., 1 Ky. L. Rep. & J. 735.. 146
Richie v. State, 58 Ind. 355 504
Richmond v. Vanhook, 3 Ired. Eq. 581, 694
Ricker v. Charter Oak Life Ins. Co., 27 Minn. 198; 38 Am. Rep. 289.... 147, 148
Ricker v. Freeman, 50 N. H. 420; 9 Am. Rep. 269 797
Riddick v Governor, 1 Mo. 147. 372
Riddick v. Walsh, 15 Mo. 519..... 372
Riddle v. Proprietors on Merrimack River, 7 Mass. 187..... 753
Rider v. Morrison, 54 Md. 429 454
Ridgeway v. Lamphear, 99 Ind. 251. 646, 649
Riges v Johnson County, 6 Wall. 191.. 758
Rigmaidon's case, 1 Lewin, 180... 268
Rigney v. Chicago, 102 Ill. 64..... 423
Rinchey v. Stryker, 28 N. Y 45... 671, 672
Rintoul v. N. Y Cent. & H. R. R., 21 Blatchf. 439 731
Rippey v. State, 2 Head, 217..... 635
Rivers v. Greggs, 5 Rich. Eq. 274..... 140
Robards v. Wortham, 2 Dev. Eq. 173... 152
Roberts v. Ogbourne, 37 Ala. 174 649
Roberts v. State, 68 Ala. 158 635
Robertson v. Berry. 50 Md. 591; 33 Am. Rep. 328... 79

PAGE.

Robeson v. Pittenger, 1 Green Ch. 57.. 772
Robinson v. Adams, 62 Me. 410 743
Robinson v. Wheeler, 25 N. Y. 252. ... 292
Rochester White Lead Co. v. Rochester, 3 N. Y 463; 53 Am. Dec. 316 182
Rockingham Mut Fire Ins. Co. v. Bosher, 39 Me. 253..... 686
Rogers v. Burlington, 3 Wall. 669..... 498
Rogers v. DeForest, 7 Paige, 272..... 237
Rogers Manufacturing Co. v. Rogers, 38 Conn. 121..... 519
Rogers v. Winton, 2 Humph. 178..... 172
Rooseveit v. Marks, 6 Johns. Ch. 266, 399 402
Ross v. Bradshaw, 1 Wm. Bl. 313..... 232
Ross v. Coff, 9 Yerg. 463. 170
Ross v N. Y. Cent., etc., R. 5 Hun, 488; 74 N. Y 617..... 280
Rosher v. Rosher, 26 Ch Div. 801 599
Rourke v. White Moss Colliery Co , 2 C. P. Div. 205; 20 Moak Eng. R..... 130
Rowland v. City of Gallatin, 75 Mo. 134; 42 Am. Rep. 395 382
Rowley v. Bigelow, 12 Pick. 311..... 396
Ruan v. Perry, 3 Caines, 120 184
Rucker v. Mo Pac. Ry. Co., 61 Tex. 499, 436
Rundle v. Delaware and Raritan Canal, 1 Wall. Jr. 275; 14 How. 80.....262, 263
Rupp v. Eberly, 79 Penn. St. 141...692, 694
Ruse v. Mut. Benefit Life Ins. Co., 23 N. Y. 516.....145, 230, 317
Rusk v. Newell, 25 Ill. 226..... 805
Russell v. Clark's Executors, 7 Cranch, 69, 89 673
Russell v. Men of Devon, 2 T. R. 667.. 752
Russell v. Hudson River R., 17 N. Y. 134 279
Russell v. Hudson R. R. Co., 2 Duer, 39 21
Russell v Sunbury, 37 Ohio St. 372; 41 Am. Rep. 523..... 31
Russell v. Watts, 25 Ch. Div. 559...274, 275
Rutherford v. Railroad Co., 35 Ohio St. 559. 67
Ryan v. N. Y. C. R. R. Co., 35 N. Y. 210.....15, 17, 18
Rylands v. Fletcher, L. R., 3 H. L. 330..... 837

Sackett v. Sackett, 8 Pick. 309..... 290
Sagory v. Dubois, 3 Sandf. Ch. 466 455
St. Clair v Cox, 106 U. S. 350..... 343
St. John v. Am. Mut. Life Ins. Co., 13 N. Y. 31 143, 250
St. John v. American Life Ins. Co., 2 Duer, 419..... 137
St. Mary's Industrial School for Boys v. Brown, 45 Md. 330 497
St. Mary Newington v. Jacobs, L. R., 7 Q. B. 47, 53..... 519
Sainter v. Ferguson, 62 E. C. L. 716 ... 127
Saltmarsh v. Tuthill, 13 Ala. 390..... 333
Sammell v. Wright, 5 Esp. 262... ... 193
Sanders v. Muegge, 91 Ind. 214..... 671
San Francisco v. Calderwood, 31 Cal. 589. 304
San Francisco v. Sullivan, 50 Cal. 275.. 304
Sargent v. George. 56 Vt. 627 578
Sawyers v. Corse, 17 Gratt. 230 337
Sawyer v. Hoag, 17 Wall. 610 455
Sawyer v. No. Am. Life Ins. Co., 46 Vt. 697 343
Sawyer v. Upton, 91 U. S. 56 564
Saxon v. Whitaker, 30 Ala. 237 323
Scatterwood v. Edge, 1 Salk 229..... 244
Scheffer v. Railroad Co., 105 U. S. 249.. 796
Schell v. Stein, 76 Penn. St. 398; 18 Am. Rep. 416 477
Schlesinger v. Stratton, 9 R. I. 578..584, 586
Schmidt v. Quinn, 136 Mass. 570..... 274

PAGE.

School Dist. in Rumford v. Wood, 13 Mass. 198 ... 753
Schott v. Harvey, 105 Penn. St. 223; 51 Am. Rep. 201 ... 111
Schufeldt v. Abernethy, 2 Duer, 533 ... 237
Scott v. Hale, 16 Me. 326 ... 292, 745
Scott v. Indianapolis Wagon Works, 48 Ind. 75 ... 668
Scott v. McMillen, 1 Litt. (Ky.) 302..671, 673
Scott v. Shepard, 2 Bl. 892 ... 15, 797
Scott v. Tyler, 2 Bro C. C 488 ... 327
Scott v. Ware, 64 Ala. 174. ... 785
Scovill v. Thayer, 105 U. S. 143. ... 454
Screven v. Bostick, 2 McCord Ch. 410, 416 ... 574
Sears v. Cottrell, 5 Mich 251. ... 753
Sears v. Eastern Railroad Co., 14 Allen, 433 ... 660
Seaver v. Boston and Marine R., 14 Gray, 466 ... 279, 281
Sebastian v. Ohio Candle Co., 37 Ohio St. 459 ... 102
Seeley v Gwillim, 40 Conn. 106 ... 109
Seneca County Bank v. Neass, 5 Denio, 329, 337 ... 713
Severin v. People, 37 Ill. 414 ... 301
Shaffner v Commonwealth, 72 Penn. St. 60; 13 Am Rep. 649 ... 396
Shane v. Kansas City R'y, 71 Mo. 237; 36 Am. Rep. 480 ... 837
Sharp v. Teese, 9 N. J. L. 322 ... 415
Shawmut Bank v. Plattsborough, etc., R. Co., 31 Vt. 491 ... 354
Sheafe v. Sheafe, 40 N. H. 516 ... 671
Sheehan v. N. Y. Cent., etc., R. Co., 91 N. Y. 332 ... 593
Shelley's case, 4 Kent Com. 221, 646, 648, 650
Shelton v. Railroad, 29 Ohio St. 214 ... 623
Sherlock v Alling, 44 Ind. 184 ... 687
Sherlock v. Alling, 93 U. S. 99 ... 696
Shimer v. Mann, 99 Ind. 190; 50 Am. Rep. 82 ... 646, 649, 692
Shippy v. Eastwood, 9 Ala. 198. ... 334
Shivey v. State, 58 Miss. 858 ... 635
Shore v. Wilson, 9 Cl. & Finn. 355 ... 720
Shurtleff v. Wiscasset, 74 Me. 130 ... 753
Siceloff v. Redman, 26 Ind. 251. ... 646
Sides v. Knickerbocker Life Ins. Co., 16 Fed. Rep. 650 ... 143
Siegrist v. Arnot, 10 Mo. App. 197. ... 436
Silver v. Frazier, 3 Allen, 382 ... 795
Sims v. Eastland, 3 Head, 368 ... 170
Simms v. Garrot, 1 Dev. & B. Eq. 393.. 649
Singer Manuf'g Co. v. Larson, 8 Biss. 151. 76
Singer Manuf'g Co. v. Loog, Lord Sheldon, L. C., 8 App. Cas ... 75, 79
Singer Manuf'g Co. v. Riley, 11 Fed. Rep. 706 ... 76, 77, 80
Singer Manuf'g Co. v. Stanage, 6 Fed. Rep 279 ... 75
Singleton v. St. Louis Mutual Life Ins. Co., 66 Mo 63; 27 Am. Rep. 321 ... 138
Skrainka v. Allen, 7 Mo. App. 434.. 455
Slack v. Walcott, 3 Mason, 508, 516 .282, 283
Slaughter House cases, 16 Wall. 106..40, 696
Sleath v. Wilson, 9 Car. & P. 607 ... 678
Slee v. Bloom, 19 Johns. 456 ... 455
Small v. Herkimer Manuf. Co., 2 N. Y. 330 ... 456
Smets v. Plunket, 1 Strobh. 372 ... 185
Smith v. Boston R., 120 Mass. 490; 21 Am. Rep. 538 ... 333
Smith v. Brampston, 2 Salk. 644 ...287. 289
Smith v. Carroll, 4 G. Greene, 146 ... 533
Smith v. City Council of Alexandria, 33 Gratt 208; 36 Am Rep. 788 ... 643
Smith v. Engle, 44 Iowa, 265 ... 667
Smith v. Flint, etc., R. Co., 46 Mich. 258; 41 Am. Rep. 161 ... 595

PAGE.

Smith v. Godfrey, 8 Fost. 379 ... 550
Smith v. Hurd, 12 Met. 371 ... 789
Smith v. Kenrick, 7 C. B. 715 ... 838
Smith v. Millett, 12 R. I. 59 ... 784
Smith v. Mut Life Ins. Co., 14 Allen, 336 ... 342
Smith v. Neilson, 13 Lea, 461 ... 170
Smith v Poor, 40 Me. 415 ... 789
Smith v. Steam Packet Co., 36 N. Y. 408 ... 793
Smock v. Pierson, 68 Ind. 405; 34 Am. Rep. 269 ... 658
Snelson v. State, 16 Ind 29 ... 686
Snyder v. Warford, 11 Mo. 513 ... 371, 374
Soltau v. De Held, 9 E. L. & E. 104; 2 Sim. (N. S.), 133 ... 575, 576
Soltau v. De Held, 2 Sim (N. S.). 113 .. 772
Sorden v Gatewood, 1 Ind. 107 ... 646
Sornberger v. Lee, 14 Neb. 193; 45 Am. Rep. 106 ... 360
Soulard v. St. Louis, 36 Mo. 546 ... 381
Souter v. Codman, 14 R. I. 119; 51 Am. Rep 264, and note, 266 ... 186
South & North Ala. R. Co. v. McLendon, 63 Ala. 266 ... 656
So Wales R. Co v. Redmond, 10 C. B. (N. S.), 674 ... 354
Southwick v. Southwick 97 Mass., 327. 389
Southworth v Sheldon, 7 How. Pr. 414. 228
Sparhawk v. Salem, 1 Allen, 30. ... 200
Spaulding v. Abbottt, 55 N H. 423 ... 363
Spaulding v. Winslow, 74 Me. 534 ... 166
Spealman v Railroad Co., 71 Mo. 434.. 370
Spear v. Crawford, 14 Wend. 20 ... 456
Speer v. Evans, 47 Penn. St. 141. ... 477
Spelman v. Aldrich, 126 Mass. 113... ... 741
Spencer v. Brighton, 49 Me. 326. . 753
Spencer v. London & Birmingham Ry. Co., 8 Sim. 193 ... 575, 576
Spring v. Hyde Park, 137 Mass. 554 ; 50 Am. Rep 834 ... 718
Stackpole v. Beaumont, 3 Ves. 88 ... 327
Stackpole v Lemon, cited Park Ins. 332. 232
Stacy v. Port. Pub. Co., 68 Me. 279 ... 743
Stanford v. Lyon, 37 N. J. Eq. ... 578
Staples v. Wellington, 58 Me. 453 323
State v. Able, 65 Mo. 357 ... 375
State v. Addington, 77 Mo. 110 ... 696
State v Allen, 2 McCord, 56 ... 753
State v. Bell Telephone Co., 36 Ohio St. 296; 38 Am Rep 583 ... 406, 410
State v Brewster, 39 Ohio St. 653... ... 91
State v. Choate, 11 Ohio, 511 638
State v. Collins, 32 Iowa, 36 635
State v. Cooper, 2 Zabr 52 ... 244
State v. Damon, 2 Tyler, 387 298
State v. Dumphey, 4 Minn. 438 635, 636
State v. Elder, 65 Ind. 282; 32 Am. Rep. 69 ... 299
State v. Emerson, 39 Mo. 80 372
State v. Field, 14 Me. 244 636
State v. Gilman, 69 Me. 63; 31 Am. Rep. 257.. ... 209
State v Greamwade, 72 Mo. 298... ... 396
State v. Hardister, 38 Ark. 605; 42 Am. Rep. 5 ... 264, 268
State v. Hartford & N. H. R. Co., 29 Conn. 538 ... 410
State v. Hattebough, 66 Ind. 223... ... 299
State v. Hawley, 4 Harr 563 ... 636
State v. Hogue, 6 Jones, N. C. (L.) 381, 636
State v. Jackson, 33 La. Ann. 1087... 695
State v Johnson, 28 Vt. 512 ... 503
State v. Keene, 50 Mo. 357... 635
State v. King, 44 Mo 283 372
State v. Knapp, 45 N. H. 148... 504
State v. Lord, 16 N. H. 357 ... 268
State v. Me. Cent. R. Co., 76 Me. 357; 49 Am. Rep. 622 ... 744

PAGE.

State v. Messmore, 14 Wis. 170 638
State v. Metzger, 26 Kans. 396 527
State v. Mone, 28 Iowa, 128..... 316
State v. Nebraska Telephone Co., 17 Neb 126 498
State v. Nett, 50 Wis. 524 635
State v. Newlin, 69 Ind. 108. 655
State v. Parsons, 40 N. J. Law, 123 92
State v. Pitts, 51 Mo. 133.... 372
State v. Powers, 38 Ohio St. 54..... 92
State v. Railroad Co., 48 Mo. 468 375
State v Reed, 39 Vt 417 503
State v. Sackett, 1 Hawks, 210..... 635
State v. Scott, 24 Kans. 68... 635
State v. Simons, 2 Speers, 767..... 756
State v. Smith, 12 Rich. 430. 635
State v. Standifer, 5 Port. 523 300
State v. Turner, 1 Houst C. C. (Del.) 76... 504
State v Vadnais, 21 Minn. 382..... 504
State v. Western Md. R. Co., 63 Md. 433.. 280
Steamboat New World v. King, 16 How. U S. 469..... 283
Steamboat Wellsville v. Geisse, 3 Ohio St 233.. 71
Stearns v. Burnham, 5 Me. 261. 447
Stedman v. Eveleth, 6 Metc. 115, 124, 125 755
Steele v. Souder, 20 Kans. 39... 401
Steere v. Hoagland, 39 Ill. 264..... 674
Sterling v. Sinnickson, 2 South. 756 328
Stetson v. Chicago, etc., R. Co., 75 Ill. 74..... 577
Stevenson v. Bay City, 26 Mich. 44 713
Stevens v. Bonar, 9 Humph. 546.... 171
Steven v. Fitch, 11 Met. 248..... 322
Stevens v. Thompson, 17 N. H. 103..... 276
Stevens v. Warren, 101 Mass. 566...145, 252 253, 254, 318
Stewart v. Patrick, 68 N. Y. 450 702
Stillman v. White Rock Manuf. Co., 3 Woodb. & M. 538 262, 263
Stillwell v. Knapper, 69 Ind. 558; 35 Am. Rep. 240 602
Stillwell v. Mut. Life Ins. Co., 72 N. Y. 385, 391.. 147, 148
Stockdale v. Hansard, 9 Ad. & El. 1.... 55
Stockdale's case, 2 Lewin, 220..... 271
Stoddard v. Doane, 7 Gray, 387 399, 402
Stokes v. Stickney, 95 N. Y. 323..... 28
Stone v. Denney, 4 Metc. 151..... 238
Stone v. Hackett, 12 Gray, 227 43
Stone v. Hubbardston, 100 Mass. 55 . .. 166
Stone v. Knickerbocker Life Ins. Co., 52 Ala. 589.. 320
Storrs v. Feick, 24 W V. 606 218
Stout v. Ennis. 28 Kans. 706 588
Stout v. Woods. 79 Ind. 108..... 667
Stover v. Bluehill, 51 Me. 439 89
Stratton v. Allen, 1 C. E. Green, 239 .. 713
Stringer's case, 4 Ch. App. 475.. 788
Strong v. State, 86 Ind. 208; 44 Am. Rep. 292, and note 299. 389
Stuart v. Walker, 72 Me. 145; 39 Am. Rep. 311... 782
Stubbs v. Houston. 33 Ala. 555 324
Sturgis v. Allis, 10 Wend. 354..... 222
Sturges v. Stetson, 1 Biss. 246 453
Suffield v. Brown, 4 DeG. J. & S. 185, 187. 275
Sullivan v. India Manuf. Co., 113 Mass. 396.. 734
Supervisor v. Rogers, 7 Wall. 180 758
Sutton v. Crain, 10 Gill & J. 456. ... 513
Suydam v. Insurance Co., 51 Penn. St. 394. 785
Suydam v. Jackson, 54 N. Y. 450 ... 102
Swan v. Manchester & Lawrence R., 123 Mass. 116, 120; 42 Am. Rep. 432... 707

PAGE.

Sweete v. Farlie, 6 C. & B. 1 232
Swetland v. Boston & Albany R'y Co., 102 Mass. 276. 461
Swick v. Home Ins. Co., 2 Dill 160 145
Swift v. Massachusetts Mut. Life Ins. Co., 3 Thomp. & Cook, 303 ... 229
Swift v. R. P., etc., Association, 96 Ill. 209... 146
Sylvester v. Edgecomb, 76 Me. 499 759

Tabb v. Williams, 4 Jones Eq. 352, 353 . 674
Tallmadge v. Fishkill Iron Co., 4 Barb. 382.. 454
Tappan v. Evans, 11 N. H. 311.... 784
Taylor v. Bowker, 111 U. S. 110 . .. 785
Taylor v. Corp. of St. Helen's, 6 Ch. Div. 264 837
Taylor v. Horde, 1 Burr. 220 506
Taylor v. Kelly, 31 Ala. 59 324
Taylor v. Miles, 5 Kans. 499..... 401
Teat v. State, 53 Miss. 439.... 300
Telegraph Co. v. Texas, 105 U. S. 460 .. 199
Temple v. Bascom, 33 Vt. 132 120
Tennant v. Battery, 18 Kans. 324.... .. 670
Tessymond's case, 1 Lewin, 169. 267
Texas Banking & Ins. Co. v. Cohen, 47 Tex. 400; 26 Am. Rep. 298; 49 Am. Rep. 22. 443
Thayer v. Brooks, 17 Ohio, 489.... 202, 263
Thayer v. Southwick, 8 Gray, 229..... 610
Thayer v. St. Louis, etc., R. Co., 22 Ind. 26. 595
Third National Bank v. Harrison, 10 Fed. Rep. 243 713
Thomas v. West Jersey R. Co., 101 U. S. 71 498
Thomas v. Winchester, 6 N. Y. 397 .. 15
Thompson v. A. T. Life & Sav. Ins. Co., 46 N. Y. 674 137
Thompson v. Boonville, 61 Mo. 283, 381, 382
Thompson v. Brown, 4 Johns. Ch. 619. 674
Thompson v. Wilson, 2 N. H. 291 ... 447
Thorp v. Feltz, 6 B. Mon. 6 674
Thorpe v. Brumfitt, L. R., 8 Ch. App. 650 769
Thurber v. Blanck, 50 N. Y. 80, see p. 86 672
Tillinghast v. Wheaton, 8 R. I. 536; 5 Am. Rep. 621 750
Tilton v. Kingston Mut Ins. Co., 5 N. Y. 405.... 443
Tilton v. American Bible Society, 60 N. H. 377 725
Tindale v. Norton, 8 Metc. 388..... .. 794
Titus v. Northbridge. 97 Mass. 258..... 166
Titus v. State, 7 Baxt. 132 508
Toledo Agricultural Works v. Work, 110 Ind. 253 697
Toledo, etc., Ry. Co. v. Brooks, 81 Ill. 245 434, 436
Toledo P. & W. Ry. Co. v. Pindar, 53 Ill. 447; 5 Am. Rep. 57..... ... 352
Toledo W. & W. Ry. Co. v. Wright, 68 Ind. 586; 34 Am. Rep. 277 352
Tompkins v. Bamberger, 3 Lea, 579 ... 179
Tootle v. Clifton, 29 Ohio St. 247..... 837
Tourtellot v. Rosebrook, 11 Metc. 460.. 288
Townsend v. Graves, 3 Paige, 455, 456.. 184
Tracy v. Talmadge, 14 N. Y. 162; 67 Am. Dec. 132 550
Trainor's case. 280
Transp. Co. v. Sweetzer, 25 W. Va. 434. 222
Triplett v. Graham, 58 Iowa, 136... ... 740
Triston v. Hardey, 14 Beav. 238 142
Trogden v. Commonwealth, 81 Gratt. 862 895, 897
Troy v. Sargent, 132 Mass. 406..... 254
Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561..... 576

PAGE.

Truitt v. Caldwell, 3 Minn. 364.... 289
Trustees of Dartm'th College v. Woodward, 4 Wheat. 636 498
Trustees of Watertown v. Cowen, 4 Paige, 510 572
Tuberville v. Stamp, 12 Mod. 152.... 287
Tucker v. Seaman's Aid Society, 7 Metc. 188 720
Tunney v. Midland R'y, L. R., 1 C. P. 291 279, 281
Turner v. Adams, 46 Mo. 95, 99 .. 673, 674
Tuttle v. Farmington, 58 N. H. 13 89
T. W. & W. R. Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613..... 433
T. W. & W. R. Co. v. Brooks, 81 Ill. 292.... 434

U. S. v. Appleton, 1 Sumner, 492 101
United States Bank v. Davis, 2 Hill, 451. 714
United States v. Bostwick, 94 U. S. 53. 292
U. S. v. DeWitt, 9 Wall. 41..... .. 696
U. S. v. Reese, 92 U. S. 214..... 696
Union Bank v. Campbell, 4 Humph. 394... 714
Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co., 97 Ill. 537; 37 Am. Rep. 129 454
Union Mut. Life Ins. Co. v. Stevens, 19 Fed. Rep. 671..... 146
N. P. Ry. Co. v. Nichols, 8 Kans. 505; 12 Am. Rep. 475 434
Unknown Heirs of Whitney v. Kimball, 4 Ind. 546... 674
Upton v. Hausbrough, 3 Biss. 417..... 455
Upton v. Tribilcock, 95 U. S. 49.. .455, 563

Valley Mutual Life Ins. Co. v. Burke (Virginia), 15 Rep. 572; 12 Ins. L. J. 337... 146, 147
Valton v. Nat. Fund Life Ass'n, 20 N. Y. 32..... 143, 146, 250
Van Cott v. Van Brunt, 82 N. Y. 535... 458
Van Kirk v. Penn. R. Co., 76 Penn. St. 66; 18 Am. Rep. 404 352
Van Natta v. Mutual Security Ins. Co., 2 Sandf. 490 730
Vanorsdall v. Van Deventer, 51 Barb. 137 648
Van Rensselaer v. Fitch, ... 313
Vandenburgh v. Truax, 4 Denio, 464; 47 Am. Dec. 268. 15, 17
Varney v. Pope, 60 Me. 195 771
Vaughan v. Com., 2 Va. Cas. 273..... 301
Vaughan v. Menlove, 3 Bing. N. C. 468; 32 Eng. C. L. 219. 15, 286, 289
Vernon v. Martin, 8 Dana, 171..... 240
Victor v. Hartford Fire Ins. Co., 33 Iowa, 210..... 609
Vincent v. Chicago & Alton R. Co., 49 Ill. 33. 409, 410, 427
Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145 799
Vinton v. Middlesex R. Co., 11 Allen, 304. 544
Vose v. Eagle Life and Health Ins. Co., 6 Cush. 42. 232

Waddle v. Stuart, 4 Sneed, 535. 170
Wade v. Kalbfleisch, 58 N. Y. 286; 17 Am. Rep. 250 28, 30
Wainwright v. Bland, 1 Mees. & W. 32. 142
Wakefield v. Fargo, 90 N. Y. 218 21
Waldo v. Martin, 4 B. & C., 319 414
Walker v. Lessee of Devlin, 2 Ohio St. 605 88
Walker v. Sauvinet, 92 U. S. 90 ... 757
Wallace v. McConnell, 13 Pet. 136.. 347
Wallis v. Hodson, 2 Atk. 114, 117..... 244

PAGE.

Walther v. Mutual Life Ins. Co. (Cal. Supt. Ct.) 13 Ins. L. J. 815; 4 Pac. Rep. 413 5
Waltz v. Foster, 12 Oreg. 247... 578
Ward v. Henderson, 5 Port. 382 184
Ward v McKenzie, 33 Texas, 297 671
Ward v. Ward, 1 Martin (N. C.), 28.... 612
Warlow v. Harrison, 1 E. & E. 295 680
Warner v. Beach, 4 Gray, 162. 256, 257
Warner v. Holyoke, 112 Mass. 362.. 280
Warnock v. Davis, 104 U. S. 775... 137, 138
144, 251, 252, 317, 318, 319
Washburn v. Nashville, etc., R. Co., 3 Head, 638 434
Washington Bank v. Lewis, 22 Pick. 24..... 713
Washington Life Ins. Co. v. Haney, 10 Kans. 525. 229, 230
Wash Mut. Ins. Co. v. Reed, 20 Ohio, 202, 206, 207..... 88
Waterbury v. N. Y. & H. R. Co., decided in 1883..... 283
Watts v. Kelson, 6 Ch. App. 166..... 837
Waugh v. Riley, 68 Ind. 482; Way's case, 41 Mich. 299.... 694, 830
Weatherhead v. Sewell, 9 Humph. 280. 170
Weaver v. Ward, Hob. 134..... 799
Webb v. Holt, 57 Iowa, 712..... 740
Webb v. R. W. & O. R. Co., 49 N. Y. 420; 10 Am. Rep. 389..... ... 15, 16
Webb's case, 2 Lewin, 196, 211. 287
Webber v. Gage, 39 N. H. 186, 187.. .. 772
Weber v. Morris & Essex R. Co., 35 N. J. L. 409; 10 Am. Rep. 253..... ... 686
Webster v. Clark, 25 Me. 313..... 782
Webster v. Upton, 91 U. S. 65..... 564
Webster v. Webster, 33 N. H. 18..... 612
Weed v. S. & S. R. Co., 19 Wend. 534. 359
Weemes v. Ventress, 14 La. Ann. 267.. 191
Weil v. Lankins, 3 Neb. 384..... .. 670
Weir v. County of Allegheny, 95 Penn. St. 415..... 479
Werth v. Springfield, 78 Mo. 107 423
West v. Citizens' Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294..... 440, 443
Westcott v. Delano, 20 Wis. 541..... 553
Western Transportation v. Newhall, 24 Ill. 466. 409
Western Union Tel. Co. v. Pendleton, 95 Ind. 12; 48 Am. Rep. 692..... 696
Weston v. Richardson, 47 L. T. R. (N. S.) 514 147, 148
Westover v. Ætna Life Ins. Co., 99 N. Y. 56; 52 Am. Rep. 1.. . 5
Wetherbee v. Baker, 35 N. J. Eq. 501. 455
Whalley v. Lancashire & Yorkshire Ry. Co., 13 Q. B. Div. 131; 30 Alb. L. J. 8..... ... 837
Wheeldon v. Burrows, 12 Ch. Div. 31. 274, 275
Wheeler v. S. F. & A. R. Co., 31 Cal. 46. 354
Wheelton v. Hardisty, 8 El. & B. 232 . 232
Whigham's appeal, 63 Penn. St. on page 198 493
Whitford v. Panama R. Co., 23 N. Y. 465 28, 30, 31, 32
White v. Godfrey, 97 Mass. 472.... 701
White v. Maynard, 111 Mass. 250; 15 Am. Rep. 28..... . 699
White v. Ward, 9 Johns. 232..... ... 222
Whitmarsh v. Walker, 1 Metc. 313.... 699
Whitney v. Clifford, 46 Wis. 138; 32 Am Rep. 703..... 379
Whitney v. Krows, 11 Barb. 18 238
Whitney v. Whitney, 14 Mass. 92, 93... 372
Whipple v. Robbins, 97 Mass. 107.. .. 348
Wickersham v. Chicago Zinc Co., 18 Kans. 41; 26 Am. Rep. 784 713
Wiggin v. Heywood, 118 Mass. 514 .. . 736

PAGE.

Wiggins v. Armstrong, 2 Johns. Ch. 144 670
Wiggins v. Hathaway, 6 Barb. 632 ... 336
Wilber v. Sprout, 2 Gray, 423 222
Wilburn v. Wilburn, 83 Ind. 55 653
Wilckens v. Willet, 1 Keyes, 521, 525, 59, 60
Wilcox & Gibbs Sewing Machine Co. v. Gibbons Frame, 17 Fed. Rep. 623 ... 76
Wiley v. West Jersey R. Co., 44 N. J. Law, 248 792
Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281 575, 576
Wilkins v. Ellett, 108 U. S. 256, 345, 346, 447
Wilkinson v. Com. Mut. Ins. Co., 30 Iowa, 119 231
Wilkinson v. Mosely, 30 Ala. 562 656
Wilkinson v. Searcy, Ala. 352
Williams v. Dakin, 22 Wend. 201 126
Williams, Ex parte, 1 Lea, 529 172
Williams v. Jones, 3 H. & C. 256, 602 ... 288
Williams v. Vance, 30 Am. Rep. 36 126
Williams v. Washington Life Ins. Co., 31 Iowa, 541 137
Williams v. Williams, 13 Mo. 211 327
Williamson v. Hitner, 79 Ind. 233 658
Willis v. Quimby, 11 Foster, 485 656
Wilmaser v. Continental Life Ins. Co. (Iowa Sup. Ct.), 23 N. W. Rep. 903 ... 147
Wilson v. Hill, 3 Metc 66 247
Wilson v. Madison, etc., R. Co., 18 Ind. 226 378
Wilson v. Merry, L. R., 1 H. L. Sc. App. 326 595
Wilson v. Willimantic Linen Co 596
Wilton v. Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11 434
Winchester v. Baltimore & Susqueh'na Railroad, 4 Md. 231 713
Winslow v. Gifford, 6 Cush. 327 718
Winton v. Cornish, 5 Ohio, 477 100
Wiswall v. G. & R. P. R. Co., 3 Jones Eq. 183 355
Womrath v. McCormick, 51 Penn. St. 494 694

PAGE.

Woodfork v. Union Bank, 3 Coldw. 488, 455
Wood v. Chicago, Milwaukee & St. Paul Ry., 51 Wis. 196 288
Wood v. Dummer, 3 Mass. 308 562
Wood v. Rutland Ins. Co., 31 Vt. 552 .. 442, 443
Wood v. United States, 16 Pet. 342 393
Woodley v. Metropolitan Ry. Co., 2 Exch. Div. 506; 21 Moak's Eng. Rep. 506 736
Woodmansie v. Logan, 2 N. J. L. 93 ... 466
Woodruff v. North Bloomfield Gravel Mining Co., 8 Sawy. 628 767, 768
Woodruff v. Parham, 8 Wall. 123 696
Woodruff v. Whittelsey, 1 Kirby, 60 .. 184
Woods v. Naumkeag Steam Cotton Co., 134 Mass. 357; 45 Am. Rep. 344 .. 298
Woodward v. Worcester, 121 Mass. 245, 773
Wooster v. Great Falls Manuf. Co., 39 Me. 246 262
Wolcott v Melick, 3 Stoct. 204 22
Wolford v. Powers, 85 Ind. 294. 44 Am. Rep. 16. 658
Womak v. McQuarry, 28 Ind. 108 .. 100
Worley v. State, 7 Lea, 385 180
Worthy v. Worthy, 36 Ga. 45 541
Wright v. Dame, 1 Met. 237 786
Wright v. Templeton, 132 Mass 50 164
Wright v. Williams, 1 M. & W. 77 837
W. U. Tel. Co. v. Pleasants, 46 Ala. 641 342
Wyoming Bank's Appeal, 11 W. N. C. 567 477

Yearnshaw's appeal, 25 Wis. 21 692
Yertore v. Wiswall, 16 How. Pr. 8, 31, 32, 34
Yost v. Conroy, 22 Ind. 464; 47 Am. Rep. 156 656
Younge v. Furse, 8 D. E. G., M. & G. 756 397

Zabriskie v. Smith, 13 N. Y. 322; 64 Am. Dec. 551 28, 31

CASES OVERRULED, DOUBTED AND DENIED.

Bunnell's Appeal (69 Penn. St. 62), denied; Town of Burlington v. Schwarzman (52 Conn. 181), 573.

Burnett v. Ins. Co. (46 Ala. 11; 7 Am. Rep. 581), denied; Hathaway v. State Ins. Co. (64 Iowa, 229), 440.

Continental Life Ins. Co. v. Volger (89 Ind. 572; 46 Am. Rep. 185), denied; Helmetag's Admr. v. Miller (76 Ala. 183), 317.

Dermani v. Ins. Co. (26 La. Ann. 69; 21 Am. Rep. 544), denied; Hathaway v. State Ins. Co. (64 Iowa, 229), 440.

Dial v. Gary (14 S. C. 573; 37 Am. Rep. 737), denied; Campbell v. Brown (64 Iowa, 425), 447.

Ex parte Robinson (2 Biss. 309), denied; Brechbill v. Randall (102 Ind. 528), 697.

Farwell v. Boston, etc., R. Co. (4 Metc. 49), denied; Darrigan v. N. Y., etc., R. Co. (52 Conn. 285), 595.

Feltham v. England (L. R., 2 Q. B. 33), denied; Darrigan v. N. Y., etc., R. Co. (52 Conn. 285), 595.

Haskins v. Haskins (9 Gray, 390), denied; Mead v. Husted (52 Conn. 53), 557.

Hayward v. Clark (50 Vt. 612), denied; Friend v. Garcelon (77 Me. 25), 741.

Helm v. First Nat. Bank (43 Ind. 167; 13 Am. Rep. 395), doubted; Brechbill v. Randall (102 Ind. 528), 697.

Hoffman v. Ætna Ins. Co. (32 N. Y. 405), denied; Hathaway v. State Ins. Co. (64 Iowa, 229), 440.

Holden v. Fitchburg R. Co. (110 Mass. 260; 14 Am. Rep. 598), denied; Darrigan v. N. Y., etc., R. Co. (52 Conn. 285), 595.

Jones v. Lake Shore and Mich. So. Ry. Co. (49 Mich. 573), denied; Leary v. Boston and Albany Railroad (139 Mass. 580), 735.

Keyes v. Little York Gold Wash. Co. (53 Cal. 424), denied; Lockwood Co. v. Lawrence (77 Me. 297), 767.

Letson v. Kenyon (31 Kans. 301), denied; Whitney v. Chambers (17 Neb. 90), 401.

Lord v. Dall (12 Mass. 115; 7 Am. Dec. 38), denied; Helmetag's Admr. v. Miller (76 Ala. 183), 317.

Parker v. Johnson (25 Ga. 576), denied; Mead v. Husted (52 Conn. 53), 557.

People v. Benson (6 Cal. 221), denied; Shartzer v. State (63 Md. 149), 503.

Pierce v. Ins. Co. (50 N. H. 297), denied; Hathaway v. State Ins. Co. (64 Iowa, 229), 440.

Regina v. Robins (2 Moody & Rob. 512), denied; Shartzer v. State (63 Md. 149), 503.

State v. Johnson (28 Vt. 512), denied; Shartzer v. State (63 Md. 149), 503.

State v. Reed (39 Vt. 41), denied; Shartzer v. State (68 Md. 149), 503.

Stearns v. Burnham (5 Me. 261), denied; Campbell v. Brown (64 Iowa, 425), 447.

Thompson v. Wilson (2 N. H. 291), denied; Campbell v. Brown (64 Iowa, 425), 447.

Union Bk. v. Campbell (4 Humph. 394), doubted; Innerarity v. Merchants' Nat. Bk. (139 Mass. 322), 714.

United States Bank v. Davis (2 Hill, 451), doubted; Innerarity v. Merchants' Nat. Bk. (139 Mass. 332), 714.

Van Cott v. Van Brunt (82 N. Y. 535), doubted; Jackson v. Traer (64 Iowa, 469), 458.

Wilson v. Merry (L. R., 1 H. L. Sc. App. 326), denied; Darrigan v. N. Y., etc., R. Co. (52 Conn. 285), 595.

West v. Ins. Co. (27 Ohio, 1; 22 Am. Rep. 294), denied; Hathaway v. State Ins. Co. (64 Iowa, 229), 440.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

WESTOVER v. ÆTNA LIFE INSURANCE COMPANY.

(99 N. Y. 56.)

Statute — prohibition of physician's testifying — waiver — death of party.

Where a statute prohibits a physician from testifying to information acquired by him while attending a patient unless the patient waives the privilege, the death of the patient makes the prohibition conclusive. (*See note, p.* 4.)

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

Rollin Tracy, for appellant.

S. E. Payne, for respondent.

EARL, J. This action was commenced upon a life insurance policy issued to the plaintiff's testator. It was provided in the policy that it should be void if the insured should commit suicide or die by his own hand. He hanged himself, and upon that ground the action was mainly defended. The plaintiff gave evidence tending to show that the testator hanged himself while insane, and the question was submitted to the jury for their determination whether the hanging was the voluntary, conscious, willing act of the testator, or whether he was at the time so insane that he was either uncon-

scious of the act which he performed, or was unable to understand what the physical consequences of it would be; and upon that question the jury found for the plaintiff. In the course of the trial the plaintiff called a physician who had known the insured for a long time, and who attended him professionally a short time before his death. He testified that he visited him first in June, 1881, and he was asked this question: "State how you found him?" The counsel for the defendant objected to the question on the ground that "the evidence was incompetent and privileged under section 834 of the Code of Civil Procedure, viz.: the witness being a practicing physician, and the evidence being a disclosure of information acquired by him in attending Gove in a professional capacity, and necessary to enable him to act in that capacity, and the witness should not be allowed to testify and disclose the information so acquired." The court overruled the objection, and the witness answered at length, giving important evidence as to the mental and physical condition at that time, and subsequently, of the insured. The claim of the learned counsel for the respondent on the argument before us was that the plaintiff, as the personal representative of the deceased, could waive the seal which the statute puts upon such evidence, and upon that ground the ruling of the trial judge was sustained by the General Term.

Section 833 of the Code provides that "a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." Section 834 provides that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 835 provides that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment," and section 836 provides that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client." It is thus seen that clergymen, physicians and attorneys are not only absolutely prohibited from making the disclosures mentioned, but that by an entirely new section it is provided that the seal of the law placed upon such dis-

closures can be removed only by the express waiver of the persons mentioned. Thus there does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of law are founded upon public policy, and in all cases where they apply the seal of the law must forever remain until it is removed by the person confessing, or the patient or the client. *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185; *Edington* v. *Ætna Life Ins. Co.*, 77 N. Y. 564; *Pierson* v. *People*, 79 N. Y. 424; s. c., 35 Am. Rep. 524; *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; s. c., 36 Am. Rep. 617. In Greenl. Ev., § 243, speaking of communications made to an attorney, the learned author says: "The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business in which they were made; nor is it affected by the party ceasing to employ the attorney and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself, in whose favor it was there placed. It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence." In Whart. Ev., § 584, it is said that the privilege of the client may be waived by him, but that "the evidence of the waiver must be distinct and unequivocal." In *Pierson* v. *People*, it was said: "The plain purpose of this statute was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead." In *Grattan* v. *Metropolitan Life Ins. Co.*, DANFORTH, J., said: "The case before us is not one where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life of the patient, and where, although by death he loses the patient, his lips must remain closed. It was held under the old law that the seal must remain until removed by the patient, and it is now so provided by statute."

The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the

purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient for the purpose of protecting the assigned estate could make the waiver, and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed. *Bowman* v. *Norton*, 5 C. & P. 177. In *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185, it was not decided nor stated that a personal representative could waive the protection of the statutes, but it was held that the personal representative or assignee of the patient could make the objection to evidence forbidden by the statute, and the opinion might have gone further and held that any party to an action could make the objection, as the evidence in itself is objectionable, unless the objection be waived by the person for whose protection the statutes were enacted.

Without further discussion or citation of authorities, we think the statute admits of no other construction than that where the evidence comes within the prohibition of the statute, its reception, if objected to, can be justified only when the patient, penitent or client, as the case may be, waives the protection the statutes give him.

We are therefore of opinion that for the error in the reception of the evidence objected to, the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

NOTE BY THE REPORTER.— In *Derier* v. *Continental Life Ins. Co.*, 24 Fed. Rep. 670, WOODS, J., said: "Statements in the proof of death, made by the physician of the insured, as to the previous complaints and ailments of the

insured, are privileged communications within the meaning of the Indiana statute and not admissible to show that the answers made to certain questions in the application for insurance were false. *Penn. Mut. Life* v. *Wiler*, 100 Ind. 92; s. c., 50 Am. Rep. 769; *Masonic Mut. Benefit Ass'n* v. *Beck*, 77 Ind. 208; *Connecticut Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250. It is true that by the terms of the policy the plaintiff, in order to have a right of action, was bound to furnish the company within a specified time 'satisfactory proof of the death;' but this did not entitle the company to go further, as it seems to have done, and require of the plaintiff a statement by the physician of his knowledge concerning the previous complaints and ailments of deceased, which, proximately at least, did not cause the death; and I see no reason at all why such statements, when so obtained, should become available to the company as evidence, in a suit upon the policy, of facts which could not be shown by the testimony of the one who made the statement. The law which declares communications between patient and physician confidential should not be evaded in any such way. *Insurance Co.* v. *Newton*, 22 Wall. 32; *Walther* v. *Mutual Life Ins. Co.* (Cal. Sup. Ct.), 13 Ins. L. J. 815; s. c., 4 Pac. Rep. 413; *Campbell* v. *Charter Oak, etc., Co.*, 10 Allen, 213; *Moore* v. *Protection Ins. Co.*, 29 Me. 97; s. c., 48 Am. Dec. 514. These cases declare the general proposition that 'the preliminary proofs presented to an insurance company in compliance with the condition of its policy of insurance are admissible as *prima facie* evidence against the assured; 'but no one of them goes to the extent, either in terms, or as I conceive, in principle, of holding that statements by physicians which are by statute made confidential become available to the company as evidence, because found in or connected with the preliminary proofs, especially when as in this case, the statements in question are not concerning the last sickness or proximate cause of death. In the opinion in *Masonic Mut. Ben. Ass'n* v. *Beck*, *supra*, it is conceded or implied that after the death of the patient the physician may testify at the instance or with the consent of 'the party who may be said to stand in the place of the deceased;' but this was aside or beyond the question presented in that case. And there are explicit authorities to the effect that the restriction of the statute can be waived only by the one who makes the confidential communication. *Westover* v. *Ætna Life Ins. Co.*, 99 N. Y. 56; s. c., 52 Am. Rep. 1; *Pierson* v. *People*, 79 N. Y. 424; s. c., 35 Am. Rep. 524; *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; s. c., 36 Am. Rep. 617; *Bowman* v. *Norton*, 5 Car. & P. 177; Greenl. Ev., § 248."

McCormick v. Pennsylvania Central Railroad Company.

(99 N. Y. 65.)

Carrier — baggage — conversion.

The plaintiff went to defendant's station at Philadelphia to take passage for Chicago. The baggage-master refused checks for his baggage unless he paid for extra baggage. The plaintiff refused this and demanded his baggage. The baggage-master declined to deliver it on the ground that it was not accessible before train time. The plaintiff refused to take passage. The next day the defendant's president promised to stop the baggage at Pittsburgh and gave him an order for it. He thereupon took passage on defendant's road for Chicago. On arriving at Pittsburgh he applied for the baggage, but was told that it had gone on to Chicago, and received an order on the Chicago agent for it. It arrived at Chicago that day, was stored at the station and the next night was destroyed by fire. The plaintiff stopped over at Pittsburgh one day and arrived at Chicago the next. *Held*, that there was a conversion of the baggage at Philadelphia and no waiver of any claim therefor.

ACTION for conversion of baggage. The opinion states the case. The plaintiff had judgment below.

Chas. M. Da Costa, for appellant.

Roscoe Conkling, for respondent.

Ruger, C. J. The verdict of the jury has determined all disputed questions of fact in the case in favor of plaintiff, and prior adjudications upon former appeals to this court have also settled the principal questions of law involved in the controversy. 49 N. Y. 303; 80 N. Y. 353. It was held upon such appeals that the proof of circumstances attending the delivery of his baggage by the plaintiff to the defendant, on March 11, 1862, at Philadelphia and the subsequent refusal of the defendant to redeliver it upon plaintiff's request, was evidence from which a jury were authorized to find its conversion by the defendant at that time. The facts upon which this proposition was based have, so far as the defendants claim, remained substantially unchanged, through all of the various subsequent trials of the case. As related by the plaintiff, whose testimony has been approved by the verdict of the jury and is therefore conclusive upon an appellate tribunal, they were substantially as follows: On March 11, 1862, between ten and eleven o'clock, P. M.

and about twenty minutes before the schedule time for starting the train, the plaintiff with his family arrived at the depot of the defendant in Philadelphia, with his baggage consisting of nine pieces for the purpose of taking passage to Chicago. While there a controversy arose between the defendant's baggage-master and the plaintiff, with reference to the payment of an additional charge for extra baggage. The plaintiff refused to pay it, and the baggage-master refused to deliver checks for the baggage until it was paid. The plaintiff several times demanded either the return of his baggage or the delivery of checks therefor, and the baggage-master as often refused to deliver the checks until the additional charge was paid or to return the baggage. The baggage-master testified that he alleged as a reason for not returning the baggage, that the train was about to start, and it had been placed in the van in such a position as to make it inconvenient or impossible to reach it and redeliver it in season for the train to depart upon its schedule time; on the other hand, the plaintiff's evidence tended to show that the baggage was in plain sight and accessible in the van, and that there was sufficient time to remove the baggage therefrom and deliver it to the plaintiff before the time for the starting of the train would expire. Under these circumstances the plaintiff refused to take passage on the train, and leaving his baggage in the possession of the defendant returned to the hotel, where he remained with his family until the next day. The baggage-master claimed that he first refused to deliver the checks on the ground that the plaintiff had not then procured his tickets, but the plaintiff testifies that to the best of his recollection he had his tickets when he first applied for checks, and under the rule referred to we must assume that his version of the transaction has been adopted by the jury as correct. The morning after these occurrences the plaintiff called on Mr. Thompson, the president of the defendant, and explained the transactions of the previous evening to him. The conversation resulted in the plaintiff obtaining an order authorizing him to receive his baggage at Pittsburg from the defendant's agent there, without the necessity of producing checks therefor, and a promise on the part of the defendant that they would cause the baggage to be stopped at Pittsburg and delivered to him upon demand. The plaintiff with his family thereafter took passage on the defendant's train for Chicago, and started upon their journey the evening of March 12. On arriving at Pittsburg the following day, he applied to the defendant's baggage-agent for his baggage,

but was informed that by some inadvertence it had not been taken off on its arrival there, but had gone on to Chicago. The baggage-master then indorsed an order upon a copy of that addressed to him, directing the baggage-agent at Chicago to deliver the baggage in question to the plaintiff on demand at that place without checks. The plaintiff's family continued their passage to Chicago on the same train, but he himself laid over for one train at some place on the route, and did not arrive at his destination until the 14th, after the destruction of his baggage. In the night following the 13th, the defendant's depot at Chicago was struck by lightning and set on fire, and was consumed with its contents. Some small portion of the plaintiff's baggage, which had been stored in the depot by the defendant, was preserved, and afterward returned to and accepted by him.

[Omitting an unimportant review of facts.]

We are also of the opinion that the defendant's several requests to charge that the evidence of the negotiations had between the plaintiff and defendant on the 12th of March, and the subsequent conduct of the plaintiff relating to his baggage was such a renewal of the relations of carrier and passenger between him and the defendant, and such a resumption of the possession and control of his baggage by the plaintiff, as constituted a waiver of any claim for damages on account of the previous conversion except such as were nominal, were properly refused by the court. The material facts upon which the opinion of the court was based on the former appeal were not confirmed by the evidence given on the last trial, and the only fact bearing upon that question which we are now authorized to consider under the verdict of the jury is the ineffectual efforts of the plaintiff to procure a return of his baggage at Pittsburg and Chicago. The evidence now disproves the idea that the plaintiff had any possession or control of his baggage after he originally parted with it to the defendant, or that his subsequent transportation over the defendant's road had any relation to the previous attempt to secure such transportation.

The case, as now presented, shows an original wrongful detention of the plaintiff's property by the defendant, and a defeat, through the negligent or willful misconduct of the defendant and its servants in carrying it beyond the point agreed upon for its redelivery, of every effort on the part of the plaintiff to regain its possession. The liability incurred by the defendant through its wrongful

refusal to give up the property to the plaintiff at Philadelphia has been in no manner modified or changed by what took place subsequently, except in respect to such part of the property as the plaintiff actually received from the defendant after the loss at Chicago. Assuming its original wrongful conversion, as we must, upon the evidence, a duty rested upon the defendant, if it desired to escape liability therefor, to replace in the actual custody and possession of the plaintiff the property wrongfully taken from him. This however it did not do before its destruction, and after that event, it of course became impossible. The defendant has therefore failed to relieve itself of the liability originally incurred.

[Minor points omitted.]

We see no error occurring on the trial which authorizes a reversal of the judgment appealed from, and it should therefore be affirmed.

All concur.

Judgment affirmed.

CRAGIE v. HADLEY.

(99 N. Y. 131.)

Bank — fraud — insolvent bank receiving deposit.

A bank hopelessly insolvent, to the knowledge of its president received a deposit from a customer and immediately thereafter suspended business and went into the hands of a receiver. *Held*, that the customer might recover the deposit.*

ACTION to recover a bank deposit. The opinion states the case. The plaintiff had judgment below.

Richard Crowley, for appellant.

Sherman S. Rogers, for respondents.

ANDREWS, J. The general doctrine that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money or of drafts or checks received and credited as money, the title to the money or to the drafts or checks is immediately vested in and becomes the property of the bank is not open to question. *Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94, *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530. The transaction in legal effect

* To same effect, *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675.

is a transfer of the money, or drafts or checks as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come to the possession of a *bona fide* holder is equally well settled, and does not at all depend upon the character of the wrong-doer, whether a corporation or natural person.

A corporation may be in a legal sense guilty of a fraud. As a mere legal entity it can have no will, and cannot act at all, but in its relations to the public it is represented by its officers and agents, and their fraud in the corporate course of the dealings is in law the fraud of the corporation. There is more difficulty in establishing a fraud against a corporation than against an individual. This arises from the difficulty in many cases of determining whether the fraud charged is imputable to the corporation. There may be knowledge of a fact by an agent of a corporation, which if brought home to the corporation itself would create responsibility in a given case, but as to which notice will not be imputed to the corporation merely from the fact that it was known by the agent. We need not enter into the distinctions upon this subject. But the general rule is well established that notice to an agent of a bank, or other corporation, intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent acting for the corporation within the scope of his authority whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion. *Holden* v. *N. Y. & Erie Bank*, 72 N. Y. 286; *Bank of U. S.* v. *Davis*, 2 Hill, 452. The drafts for the proceeds of which this action is brought, amounting to $14,793.37, were deposited by the plaintiffs in the usual course of business with the First National Bank of Buffalo between two and three o'clock in the afternoon of the 13th day of April, 1882, and were credited in the plaintiffs' pass-book and on the books of the bank to their account. The bank closed its doors at the usual hour on that day and never opened them afterward. It turned out that the bank was irretrievably insolvent, owing debts to the amount of $1,300,000,

with assets not exceeding in value forty per cent of its debts, and had been so insolvent for months before its failure. It does not admit of question that the condition of the bank was such that if it was known to its officers or agents charged with the direction or management of its affairs, a gross fraud was perpetrated on the plaintiffs in permitting them, in reliance upon its supposed solvency, to make the deposit in question. The bank was not only irretrievably insolvent, but it had apparently given up the struggle to maintain its credit before the deposit was made. Its drafts had gone to protest on the 12th, and it was manifest that a condition of open insolvency must immediately ensue. The acceptance of the deposit under those circumstances constitute such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds. See *Anonymous Case*, 67 N. Y. 598. The presumption that the managing officers and agents of the bank had notice of its condition, arises from the circumstances. They could not have been ignorant without imputing to them gross inattention to its affairs. It was moreover admitted on the trial that the entire control and management of the bank was in fact intrusted to and conducted by its president, and it is clearly shown that he was familiar with the desperate condition of the bank at the time of, and for many weeks before the deposit was made.

It is claimed, that the right of the plaintiffs to reclaim the drafts or their proceeds is precluded by sections 5234 and 5242 of the Revised Statutes of the United States, which forbid all preferential payments or transfers by an insolvent bank, and provide for a ratable distribution of its assets among its creditors. The answer is that the plaintiffs do not claim under a transfer from the bank, but under their original title. They are not seeking to enforce any right as creditors of the bank, but to reclaim their own property obtained by fraud. Their relation as creditors terminated when they elected to rescind the contract. The right to a restoration in such case may be defeated by the acts or acquiescence of the defrauded party, or because the property has lost its identity and cannot be traced, or other persons have innocently acquired interests in ignorance of the fraud. But neither the creditor of an insolvent bank, nor its assignee in bankruptcy, has any equity to have the plaintiffs' property applied in payment of the obligations of the bank, and the statute does not sanction so palpable an injustice.

The judgment should be affirmed.

All concur. *Judgment affirmed.*

LOWERY v. MANHATTAN RAILWAY COMPANY.

(20 N. Y. 158.)

Damages — proximate cause.

Fire was negligently allowed to fall from a locomotive on defendant's elevated railroad upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse was frightened and ran away. The driver attempting to drive him against the curbstone to stop him, the wagon passed over the curbstone and injured plaintiff, who was on the sidewalk. *Held*, that he might recover therefor.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Hugh L. Cole, for appellant.

Osborne E. Bright, for respondent.

MILLER, J. The principal question arising upon this appeal relates to the right of the plaintiff to recover for the injuries sustained.

The claim of the defendant is, that the cause of the injury was too remote to authorize a recovery of any damages whatever, and it is urged that the court erred in denying the motion to dismiss the complaint, made by the defendant's counsel on the ground stated, as well as in the charge to the jury, that if they believed "that the coal and ashes fell from the defendant's locomotive, through any negligence on the part of the defendant, its servants or agents, and falling upon the horse, caused him to become unmanageable and run against the plaintiff, inflicting injuries upon him, then the defendant is liable to the plaintiff for his damages, occasioned thereby." The same question was also raised by the defendant's counsel by a request to the judge to charge, that "if the jury believed the accident occurred through the driver's error of judgment in endeavoring to obtain control of his horse, the plaintiff cannot recover," which was refused and an exception duly taken to the decision.

It is urged by the appellant's counsel that where there is an intermediary agent or medium between the primary cause of the

* See *White* v. *Conly*, *post*.

injury and the ultimate result, the rule of law to be applied is, that where the original act complained of was not voluntary or intentional, or one of affirmative illegality, or in itself the cause of criminal complaint, but was caused by negligence, the responsibility is limited to the necessary and natural consequences of the act, and that when beyond that, they are or may be modified or shaped by other causes, they are too remote to be the foundation of legal accountability.

The injury sustained by the plaintiff was caused by reason of fire falling from a locomotive of the defendant upon a horse attached to a wagon, in the street below and upon the hand of the driver. The horse became frightened and ran away, and the driver attempted to guide his movements and drive him against a post of the elevated railroad so as to stop him. Failing to accomplish this he intentionally turned the horse and attempted to run him against the curbstone to make it heavy for him and so arrest his progress, but the wagon passed over the curbstone instead of being arrested by it, and threw the driver out and ran over and injured the plaintiff.

It will be seen that the injury was not caused directly by the defendant, but was produced through the instrumentality of the horse and driver, the latter of whom, it appears, was doing all that lay in his power and exercising his best judgment in attempting to stop the frightened animal and to prevent any further injury, and the question we are called upon to consider here is, whether in view of the fact that the plaintiff may have been injured by reason of the management of the horse by the driver, in consequence of which it was diverted from the natural course it might otherwise have taken, the defendant is relieved from responsibility for the result of the accident.

It may be assumed that at that time the driver, who was smarting from the effects of the burning coal which had fallen upon his hands, and startled by the suddenness of the accident, may have been somewhat disconcerted by the peril in which he was placed, and therefore was unable to manage and control the infuriated animal as he might otherwise have done. The law however makes allowances for mistakes and for errors of judgment which are likely to happen upon such an emergency. It does not demand the same coolness and self possession which are required when there is no occasion for alarm or a loss of self-control.

Where a person is travelling upon a train of cars and a collision has taken place or is likely to occur, and he under the excitement of the moment, jumps from the train and thereby increases his own danger and chances of injury, although the act of attempting to escape is very hazardous and negligent, yet it is an instinctive act which naturally would take place when a person seeks to avoid great peril, and though wrong in itself, that fact does not relieve the company from liability, if its negligent conduct and a sense of impending danger induced the act.

In the case under consideration, the driver was passing along in pursuit of his customary business driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability. If he had allowed the horse to continue on in its own way, it is by no means clear that a similar, if not greater injury might not have been inflicted upon some other person than the plaintiff. It is impossible to determine what the result might have been in such a case, and therefore it is indulging in speculation to say that the driver's act, under the circumstances, was not the best thing that could have been done. In such cases, it is difficult to disconnect the final injury from the primary cause, and say that the damages accruing are not the natural and necessary result of the original wrongful act. The defendant was chargeable with an unlawful act which inflicted an injury upon the driver and the horse in the first instance, and ultimately caused the injury sustained by the plaintiff. The injury originally inflicted was in the nature of a trespass, and the result which followed was the natural consequence of the act. So long as the injury was chargeable to the original wrongful act of the defendant, it is not apparent, in view of the facts, how it can avoid responsibility. There was no such intervening human agency as would authorize the conclusion that it was the cause of the accident, and therefore it cannot be said that the damages were too remote.

The company would clearly be liable for any direct injury arising from the falling of the burning coals upon the horse if it had been left to pursue its own course uncontrolled by the driver, and there would seem to be no reason why it would not be equally liable where the driver seeks to control the horse and exercises his best judgment

in endeavoring to prevent injury. That he failed to do so for want of strength or by reason of an error of judgment does not prevent the application of the principle which controls in such a case.

It may, we think, be assumed that such an accident might occur in a crowded street where conveyances are constantly passing, and that the driver of the horse, who might possibly be injured by the defendant's unlawful act, would seek to guide the animal, and if possible, prevent unnecessary injury. The action of the driver, in view of the exigency of the occasion, whether prudent or otherwise, may well be considered as a continuation of the original act, which was caused by the negligence of the defendant, and the defendant was liable as much as it would have been if the horse had been permitted to proceed without any control whatever. We think that the damages sustained by the plaintiff were not too remote, and that the wrongful act of the defendant, in allowing the coals to escape from the locomotive, thus causing the horse to become frightened and run, was the proximate cause of the injury, and that the running away of the horse and the collision with the plaintiff were the natural and probable consequences of the negligence of the defendant.

These views are fully sustained by the decisions of the courts. *Scott* v. *Shepard*, 2 Bl. 892; *Lynch* v. *Nurdin*, 1 Ad. & El. (N. S.) 29; *Former* v. *Scldmecher*, 75 Mo. 113; *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; 32 Eng. C. L. 219; *Guille* v. *Swan*, 19 Johns. 381; s. c., 10 Am. Dec. 234; *Thomas* v. *Winchester*, 6 N. Y. 397; *Vandenburgh* v. *Truax*, 4 Denio, 464; s. c., 47 Am. Dec. 268; *Webb* v. *R., W. & O. R. Co.*, 49 N. Y. 420; s. c. 10 Am. Rep. 389; *Pollett* v. *Long*, 56 N. Y. 200; *Putnam* v. *B'd'y, etc., R. Co.*, 55 N. Y. 108; s. c., 14 Am. Rep. 190. We do not deem it necessary to examine these cases in detail, and while it may be said in some of them the injury was caused by the positive, unlawful act of the defendant at the beginning, in others the original act was lawful, while the consequence which followed resulted from the subsequent interference with the plaintiff's rights. In *Guille* v. *Swan*, 19 Johns. 381, *supra*, the act of sending up the balloon was lawful in itself, and the injury which followed was the result of its falling on the premises of the plaintiff in a city, and attracting the attention of people outside, and thus causing the damages incurred. In the case at bar the falling of the coals on the horse and driver was caused by the negligence of the defendants' servants, but it was nevertheless a

direct invasion of the rights of the property and person of the driver and the owner of the horse and wagon, and produced the injury to the plaintiff the same as the falling of the balloon on the plaintiff's premises in the case last cited. We are unable to perceive any distinction between the two cases which would justify the conclusion that the damages to the plaintiff here were more remote than those which were incurred in the case last cited. The principle which is applicable to both cases is the same; it is not apparent that any distinction can be drawn between them which would relieve the defendant from responsibility. It is enough to charge the defendant that it was the author and originator of the wrongful act which produced the injury, and hence it is liable for the same as one of the natural consequences arising from the act itself. It is difficult to conceive any valid ground upon which it can be claimed that the effect of the defendant's negligence was not a probable and the natural consequence following the same.

We are referred to numerous cases cited by the appellant's counsel which, it is claimed, sustain the doctrine contended for by him, and great reliance is placed upon the case of *Ryan* v. *N. Y. C. R. R. Co.*, 35 N. Y. 210, which was followed and sustained in *Penn. R. Co.* v. *Kerr*, 62 Penn. St. 653; in the *Ryan* case the court defined remote damages to be those which are not an ordinary and natural, not an expected, not a necessary and usual result of the negligent act. It appeared in that case that the fire was communicated first to the defendant's building from a locomotive on its road, and then over a space of one hundred and thirty feet to the building of the plaintiff, and it was held that the defendant was not liable for the reason that it was not to be anticipated that the fire would be communicated to premises not contiguous. This is far different from a case where a direct injury is inflicted upon a person and property; as in the case at bar it was inflicted in a populous city upon a horse and driver, and caused the horse to become frightened and run away, and it can scarcely be claimed that the consequence which ensued was not the probable and direct cause of the injury sustained.

The two cases last cited were considered and reviewed by FOLGER, J., in *Webb* v. *R., W. & O. R. Co.*, 49 N. Y. 420, *supra;* S. C., 10 Am. Rep. 389. In that case the fire was communicated by live coals dropped from the engine and setting fire to a tie on the track, which spreading to an old tie by the side of the track, and from that to some rubbish, and then to the fence along the track, and

then to plaintiff's woodland, did the damage complained of, and it was held that the defendant was liable for the injury. It is laid down in the opinion that the *Ryan* case held that the action in that case could not be sustained for the reason that the damages incurred by the plaintiff were not the immediate but the remote result of the negligence of the defendant, and it was stated that this was not a new rule. FOLGER, J., says in regard to that case: "The pith of the decision is that this was a result which was not necessarily to be anticipated from the fact of the firing of the wood-shed and its contents; that it was not an ordinary, natural and usual result from such a cause; but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in *Vandenburgh* v. *Truax*, 4 Denio, 464; s. c., 47 Am. Dec. 268, which was that the consequence complained of was the natural and direct result of the act of the defendant. The principle is said in the *Ryan* case not to be inconsistent with that which controlled the disposition of the latter case, and to be unquestionably sound, but should be applied according to sound judgment in each case as it arises." After referring to the Pennsylvania decision, the learned judge concludes that the *Ryan* case was not controlling in the disposition of the case considered more than the long line of decisions which preceded it.

It will be observed that the *Ryan* case is clearly distinguishable from the case at bar, and can scarcely be held to be applicable to the facts presented, here and was not followed in the case last cited, although there was considerable similarity in the leading facts between the two cases. It certainly should not be held to be controlling where there was a positive and unlawful act of the defendant, which, as we have seen, induced the accident which was the cause of the plaintiff's injury. Nor have the courts of this State since the decision of *Ryan* v. *N. Y. C., etc., supra*, held that it established any new or different rule from the one which has long existed and which has been settled by repeated adjudications, as will be seen by the citations already made.

In *Pollett* v. *Long*, 56 N. Y. 200, it was held that where an injury to one is caused by and is the natural and probable result of the wrongful act or omission of another, such other is liable therefor, although other causes, put in motion by the act or omission, and

which in the absence thereof would not have produced the result, contribute to the injury. It appeared in this case that the defendant's dam had given away and carried away a dam of the plaintiff, and by increasing the volume of water tore out the dam of a third party, of whom plaintiff was assignee, and the court charged, in substance, that defendant's negligence must have been the sole cause of the injury or there could be no recovery; that although defendant's dam was defective and out of repair, and in consequence gave way, if there was sufficient water in the middle pond when its dam gave way to materially increase the volume and force of the stream, then plaintiff could not recover for injuries to the lower dam, as the damages would be too remote. This was held error. GROVER, J., in his opinion, after stating that *Ryan* v. *N. Y. C. R. Co.* and *Penn. R. Co.* v. *Kerr, supra*, were cited in support of the charge, and after discussing the *Ryan* case, says: "Assuming that this rule was correctly applied in the case of *Ryan* v. *New York Central*, * * * it comes far short of sustaining the proposition under consideration." It will be seen that the *Ryan* case is clearly distinguishable from the case at bar.

We have carefully examined the other cases in this State which are cited and relied on by the appellant's counsel, and none of them hold that no responsibility exists where the evidence establishes an act of the defendant which was the cause of injury to a third person, although that injury may have been occasioned by the intermediate agency and through the instrumentality of a party who in the first instance was the direct object from which sprang the final result which was the cause of the damages claimed. We think that no such case can be found in the reports. The decisions which are relied upon from other States do not present a state of facts which can be regarded as entirely analogous to the case at bar; and even if any of them may be considered as leaning in the direction claimed, in view of the fact that the decisions in this State are to the contrary, they are not decisive of the question considered. There was sufficient evidence of the defendant's negligence to submit the case to the consideration of the jury as was done.

There was no error in the charge of the judge, or refusals to charge as requested, or in any ruling on the trial.

The judgment was right and should be affirmed.

All concur, except RAPALLO, J., dissenting, and EARL, J., not voting. *Judgment affirmed.*

HICKEY v. TAAFFE.

(99 N. Y. 204.)

Statute — "business or vocation."

The statute prohibiting the employment of any young child in "playing on musical instruments, rope or wire-walking, dancing, begging or peddling, or as a gymnast, rider, contortionist or acrobat," or "in any business, exhibition or vocation injurious to the health or dangerous to the life or limb," etc., does not apply to the employment of a child in a steam laundry, where there is dangerous machinery.

ACTION for personal injuries by negligence. The plaintiff under sixteen years of age, was employed in a steam laundry, where her hand was crushed between rollers. The plaintiff had judgment below.

Gerard B. Van Wart, for appellant.

Patrick Keady and *Charles J. Patterson*, for respondent.

DANFORTH, J. The plaintiff was under the age of sixteen years, and the jury have found that the business at which she was put by the defendant was dangerous to life and limb; that without negligence on her part she was, while pursuing it, seriously injured, and have awarded damages. The case was so treated both by the trial court and General Term that the only question for our consideration is whether the cause of action may be dealt with under the provisions of the act "to prevent and punish wrongs to children" (Laws of 1876, chap. 122). The first section declares that "any person having the care, custody or control of any child under the age of sixteen years, who shall exhibit, use or employ * * * such child * * * in or for the vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging or peddling, or as a gymnast, contortionist, rider or acrobat, in any place whatsoever; or for or in any obscene, indecent or immoral purpose, exhibition or practice whatsoever; or for or in any business, exhibition or vocation injurious to the health or dangerous to the life or limb of such child; or who shall cause, procure, or encourage such child to engage therein, shall be guilty of a misdemeanor." The next section provides that "every person who shall take, receive, hire, employ, use,

exhibit, or have in custody any child under the age, and for any of the purposes mentioned in the first section of this act, shall be guilty of a misdemeanor."

The fourth section is in these words: "Whoever having the care or custody of any child shall willfully cause or permit the life of such child to be endangered or the health of such child to be injured; or who shall willfully cause or permit such child to be placed in such a situation that its life may be endangered or its health shall be likely to be injured, shall be guilty of a misdemeanor."

Is the defendant within the statute? He was the owner of a laundry, and on the 1st of April, 1882, the plaintiff was employed by him in its business. Having regard to the primitive mode of conducting it, such occupation would evidently be attended by no greater danger than that of the kitchen or the dairy. But with the introduction of machinery a very different condition of things exists. The collar and cuff ironer at which the plaintiff was employed had four rollers, of which two were heated; there was no guard or protection in front of them; the machine was supplied with wheels, catches, bolts and other parts, but no shifter or lever with which to stop or start it; it was run by steam, its motion in no way controllable by the operator, and when, as in the case before us, the hand became entangled, it was necessarily crushed to the thinness of a linen collar, or burned beyond the possibility of restoration. But notwithstanding all this, we are constrained to say that the employment in which she was engaged is not one of those stigmatized by statute, and consequently that the defendant upon that alone cannot be charged. The scope of the act cannot be broader than its title: "to prevent and punish wrongs to children." To that end it prohibits first, their employment in certain specified vocations, intended for the amusement of the public, and which however unprofitable to them and dangerous to the actor, are at least in themselves innocent; second, in the most general terms, "any purpose, exhibition, or practice" which is either obscene or has an indecent or immoral purpose; and third, their employment for or in any "business, exhibition or vocation injurious to the health," or "dangerous to the life or limb of such child." Here are three clauses, the first implying a service or exhibition attractive to the spectator, because of the personal skill or dexterity of the performer; the second, practices which tending to degrade and corrupt, are against

good morals; the third, "any business, exhibition or vocation which is injurious or dangerous." The word "vocation" appears in the first clause, where its meaning is illustrated by an enumeration of pursuits literally within the meaning of the act; the word "exhibition" fitly describes those pursuits, and if they stood alone in the third clause, although preceded by the word "any," would, within well-settled rules of construction, embrace only things of the same kind or class as those with which they were first connected. The other word, "business," is, it is true, used for the first time. In general use it has a broader significance than either of the others, and might include any affair, however serious or trivial, into which volition entered. But here it is used with words of limited meaning, which have received in the same act a particular application, and upon the same principles of construction must be referred to things of the same kind as those specified and to which the other words are referred. *Wakefield* v. *Fargo*, 90 N. Y. 218.

We think therefore that a "business or vocation," to be within the purview of the statute, must be an employment either vicious in itself or one which partakes of the character of an amusement, and that it has no application to productive industries or useful or necessary business or occupation. The defendant's employment was undoubtedly of the latter character, and although in the abstract he was engaged in "business," and the machine employed in its prosecution was dangerous, there is no analogy with the avocations specified in the act, and we find nothing to show that any wider sense was intended.

The trial court therefore erred in submitting the case to the jury as one in which the plaintiff might recover if in their opinion the employment of the child involved such risk to her as to bring the vocation within the meaning of the term "dangerous to life or limb." Much stress is laid by the learned counsel for the respondent upon the remarks of FOLGER, C. J., in *Cowley* v. *People*, 83 N. Y. 464; s. c., 38 Am. Rep. 464, that the life of a child might be endangered or its health injured "by putting him to ride on a vicious or unmanageable horse, or by putting him to tend a dangerous piece of machinery." The remarks were pertinent to the question then in hand — a conviction under the fourth section (*supra*), but did not involve a consideration either of an inquiry or facts similar to those now before us. The case was put by way of illustration merely and cannot serve as precedent or authority.

The respondent also argues that without the statute the plaintiff might recover. That may well be. The complaint was properly framed to make out a cause of action at common law. There was evidence tending to support it. but in that aspect the defendant had the ruling of the trial court in his favor, and it is not now the subject of review.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

HEALTH DEPARTMENT OF THE CITY OF NEW YORK v. PURDON.

(99 N. Y. 237.)

Nuisance — injunction — illegal business.

The sale of adulterated teas will not be restrained by injunction unless it appears to threaten serious danger to human life or serious detriment to health.

ACTION to restrain the use of tea. The opinion states the point. The defendant had judgment below.

W. P. Prentice, for appellant.

Geo. H. Foster, for respondent.

RUGER, C. J. The fact that the teas, the sale of which this action was brought to restrain, were adulterated, and that their possession for the purpose of sale to the general public was a nuisance subjecting the offenders to an indictment, and in case of sale, to actions for penalties for selling adulterated goods, cannot be successfully controverted; and yet this fact alone is insufficient to support the action. The plaintiffs have thereby established but one of the elements necessary to entitle them to the relief demanded. Courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment. *Wolcott* v. *Melick,* 3 Stockt. 204; *Attorney-General* v. *Utica Ins. Co.,* 2 Johns. Ch. 371. Its power however to do so in case of the exercise of any trade or business which is either illegal or dangerous to human life,

detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law. §§ 636, 637 and 646, N. Y. Cons. Act of 1882; Story Eq. Jur., §§ 921, 924; Eden Inj., chap. 11. Whatever source of jurisdiction is appealed, to the rule governing its exercise is the same, and the court will inquire not alone as to the unlawfulness or offensiveness of the act complained of, but also as to its extent, the circumstances surrounding its exercise, and the degree of danger to be apprehended from its continuance. It was said in the case of *Jordan* v. *Woodward*, 38 Me. 424: "It is not every violation of the rights of another which may be ranked under the general head of nuisance, which will authorize the interposition of this court by means of an injunction. It must be a case of strong and imperious necessity, or the right must have been previously established at law, or it must have been long enjoyed without interruption." The ground of equity jurisdiction in such cases has been said to be to "prevent irreparable mischief, and also to suppress offensive and vexatious litigation." Story Eq. Jur., §§ 923, 925. He also says: "That in all cases of this sort courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting and the injury to the public doubtful, that alone will constitnte a ground for withholding this extraordinary interposition. § 924a. It was held in *Eastman* v. *Company*, 47 N. H. 78, that "the plaintiffs should of course show by their proof a case of strong and clear injustice, of pressing necessity and imminent danger of great and irreparable damage, and not of that nature for which an action at law would furnish a full and adequate remedy." In the *Earl of Ripon* v. *Hobart*, 3 Myln. & Keen. 179, it was said by Lord Chancellor BROUGHAM that "it is always to be borne in mind that the jurisdiction of this court over nuisances by injunction at all is of recent growth, has not till lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the act or thing complained of was admitted to be directly and immediately hurtful to the complainant." The language used in the Consolidating Act giving courts jurisdiction to interfere by injunction to restrain nuisances in the city of New York has not changed the

established rule as to the imminency of the danger to be apprehended, or the necessity of such a remedy to avoid irreparable injury. By that act it must appear that the injunction is "needed" among other things to prevent "serious danger to human life or serious detriment to health," and unless the facts of this case bring it within the requirement that it is imperatively necessary to prevent the consequences described, the plaintiffs have failed to show such a case as entitles them, as matter of right, to the remedy demanded.

If we regard the findings of the court below alone, we see that although it has found the teas in question were adulterated and colored to some extent with offensive and noxious drugs and substances, it still reaches the conclusion that no sufficient evidence had been produced to prove that the use of said teas was "dangerous to human life or detriment to health and unwholesome, or that the injunction prayed for is needed to prevent serious danger to human life or detriment to health, or that the said teas, or the selling or offering for sale of the same, is a nuisance." It is claimed by the appellants that these findings are inconsistent and that they should be considered in their most favorable aspect for the appellants. When the findings of the trial court are apparently inconsistent, it is the duty of the appellate tribunal, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. *Bennett* v. *Bates*, 94 N. Y. 354. But the application of this rule is not called for here as we find no irreconcilable repugnancy in the findings. It is quite possible that the substances found in the teas in question did not exist in such proportions or quantities as rendered their use necessarily dangerous or unwholesome to human health or life, even though some of them were in their nature deleterious and unhealthy, and might, under certain circumstances, and if absorbed into the system in sufficient quantities, be both unwholesome and dangerous. It results therefrom, unless the undisputed evidence shows the conclusion reached by the court, that the use of these teas was not unwholesome, is erroneous, that there is no ground upon which the judgment appealed from can be disturbed.

[Minor considerations omitted.]

We are of the opinion that the judgment should be affirmed.

Judgment affirmed.

All concur.

HEGERICH v. KEDDIE.

(99 N. Y. 258.)

Abatement — action for death by negligence.

A statutory cause of action for death by negligence abates by the death of the wrong-doer.

ACTION for death by negligence. The opinion states the point. The defendant had judgment on demurrer, reversed at General Term.

John L. Lindsay, for appellant.

George V. N. Baldwin, for respondent.

RUGER, Ch. J. A brief reference to some of the elementary principles applying to civil actions will serve the purpose, at least, of defining the terms used, and the modifications introduced into the law by the statutes hereinafter referred to. Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto*. The actions known as detinue, trespass, trespass on the case, and replevin were those used in causes of action arising from torts, and were described as actions *ex delicto*. Trespass on the case was the appropriate form of remedy for all injuries to person or property which did not fall within the compass of the other forms of action. 3 Stephens' Com. 449. At common law, originally, all actions arising *ex delicto* died with the person by whom or to whom the wrong was done. Thus, when the action was founded on any malfeasance, or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be "not guilty," the rule was "*actio personalis moritur cum persona.*" 1 Wms. Ex. 668. It was however held in *Hambly* v. *Trott*, Cowp. 371, Lord MANSFIELD delivering the opinion, that "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning man, etc., then the person injured has only a reparation for the *delictum* in damages to be assessed by a

jury. But when besides the crime property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor." "So far as the tort itself goes an executor shall not be liable, and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged." By the statute of 4th Edward III, chapter 7, actions "*de bonis asportatis*" were given to the executors of a deceased person for personal property taken from their testator and carried away, but for all other causes of action arising out of wrongs done either to the person or property the rule of "*actio personalis moritur cum persona*" applied. 1 Wms. Ex. 672. Under the clause of the Constitution making the rules of the common law the law of the State, it must be held that these rules still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute.

It had been held in this State prior to the enactment of the Revised Statutes, that an action against the representatives of a postmaster for money feloniously abstracted from a letter by his clerk, *Franklin* v. *Low*, 1 Johns. 402, and against a sheriff's representatives for an escape occurring during his life-time, *Martin* v. *Bradley*, 1 Caines, 124, did not lie against such representatives. In the case of *People* v. *Gibbs*, 9 Wend. 29, decided in 1832, it was held that an action against the executors of a sheriff for the default of his deputy in returning process, notwithstanding an action in *assumpsit* for money had and received was by statute authorized therefor, did not lie, inasmuch as the cause of action was founded in tort.

As no reference is made in this case to the Revised Statutes, it is inferred that it arose previous to their enactment, although the case does not disclose that fact. Still the date of the trial, November, 1830, would not necessarily lead to such an inference. The Revised Laws (Vol. 1, p. 311) had theretofore enlarged the scope of the statute of 4th Edward III, and provided for actions by and against executors and administrators for property taken and converted by the testator or intestate during his life-time. Under this condition of the law the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: "For wrongs done to the property,

rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators. against such wrong-doer, and after his death against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." Section 2. "But the preceding section shall not extend to actions for slander, for libel or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or adminstator." It cannot be successfully claimed that the language, "actions on the case for injuries to the person" up to this time did not include, according to the universal classifications, all actions without regard to the person or persons to whom they accrued, which had as their cause, or were founded upon injuries to the person of another arising from the negligent or careless conduct of a wrong-doer. It must also upon well-settled principles of construction be conceded that these terms were used according to their legal and well-understood signification at the time of their employment. If the language of the statute applicable to this case be collocated and read according to its plain meaning and intent the following sentence would seem to be the result: Actions by and against executors and administrators for wrongs done to the property, rights or interests of their intestate or testator are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestste or testator of any executor or administrator, they shall not survive the death of the person to whom or by whom the wrong is done. The wrongs referred to in these sections are such only as are committed upon the "property rights or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action.

Among the questions which have arisen over the construction of these sections the most prominent are probably those relating to the signification of the words "property rights or interests," as used in the first section, and the effect of the enumeration in the second section of certain specific actions as being excepted from the operation of the

prior section. It is inferable from the opinions expressed in *Haight* v. *Hayt*, 19 N. Y. 464, that the court there supposed that the words "property rights or interests," as used in the statute, covered and included all injuries tortiously inflicted by one person to the detriment of another, whether affecting his person or property, and also that the mention of certain actions in the second section manifested an intention on the part of the law-makers to exempt all others founded on tort from abatement by death. The views expressed on those questions seem to have been unnecessary, as the action there was for a fraudulent representation with respect to incumbrances, whereby a purchaser of land at a public sale was induced, and the purchaser was compelled to pay an incumbrance which he was led to believe did not exist. The injury thus seems clearly to have been one to rights of property alone and was saved from abatement by the first section of the statute. The language and structure of these sections would seem to repel the idea that the exemptions provided by the second section were intended to authorize the survival of all other actions for torts. In the view implied by the language used in that case the first section would be quite unnecessary, as any provision specifying the classes of action which did survive would be superfluous if conjoined with one enumerating all actions not surviving. Such a construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding that causes of action abated by death which were not named in the second section. Thus it has been held that a cause of action by a master for the seduction of his servant does not survive, *People* v. *Tioga Com. Pleas*, 19 Wend. 73; or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person, *Zabriskie* v. *Smith*, 13 N. Y. 322; s. c., 64 Am. Dec. 551; or for a breach of a promise to marry, *Wade* v. *Kalbfleisch*, 58 N. Y. 286; s. c., 17 Am. Rep. 250; or for damages occasioned by the negligent killing of another, *Whitford* v. *Panama R. Co.*, 23 N. Y. 465; or for a penalty incurred by trustees under the General Manufacturing Act, *Stokes* v. *Stickney*, 96 N. Y. 323; and for fraud in inducing one to marry another, *Price* v. *Price*, 75 N. Y. 244; s. c., 31 Am. Rep. 463.

The statute obviously created a great change in the law, and applied to a numerous class of cases, which had not before been held to survive. Thus it enlarged the rights created by the act of 4 Edward III, so as to include actions for trespass *de bonis aspor-*

latis against representatives as well as by them, and removed the limitation which authorized other actions for wrongs against representatives only when the estate of their testator or intestate was benefited by the act complained of. The change is illustrated by the case of *Benjamin's Ex'rs* v. *Smith*, 17 Wend. 208, where it was held that the cause of action accruing to a party against a sheriff for a false return did not abate by the plaintiff's death. This had previously been held otherwise. *People* v. *Gibbs*, *supra*. In *People* v. *Tioga Com. Pleas*, 19 Wend. 73, it was held that such actions alone as survived to executors and administrators were assignable, and that a cause of action by a master for the seduction of his servant was not assignable.

Although this action is based upon the theory of a loss of service by the master, it must inferentially have been determined that it did not affect the property rights or interests of the master in such manner as to cause the right of action to survive. GROVER, J., in *Haight* v. *Hayt*, said "that the statute had changed the law so far as property or relative rights are affected by the wrongful act." Judge RAPALLO has said that "the rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished." *Cregin* v. *B. C. R. Co.*, 75 N. Y. 194; S. C., 38 Am. Rep. 474.

Reference to the law as it stood previous to the revision (and the application of the rule of construction embodied in the maxim of *noscitur a sociis*) would seem to require such an interpretation of the words "property rights or interests," as will confine their application to injuries to property rights only, and such as were theretofore enforceable by the deceased. It is stated in 1 Wms. Ex. 677, "that no action is maintainable by the executor or administrator upon an implied or express promise to the deceased when the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate." *Chamberlain* v. *Williamson*, 2 M. & S. 408, is cited in support of this proposition. In that case Lord ELLENBOROUGH said: "Executors and administrators are the representatives of the personal property, that is the debts and goods of the deceased; but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held

"that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased when no special damage to the personal estate can be stated on the record. So with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskilfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney, such cases being in substance actions for injuries to the person."

This view of the law was approved in a similar case in this court. *Wade* v. *Kalbfleisch, supra.* It was said in *People* v. *Tioga Com. Pleas, supra,* by COWEN, J., that "the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate, so far that it can be touched by a contract, and made a subject of transfer between parties in any way at law or in equity; if the right be not so entirely personal that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency, or will, on his death, pass to his executors. The reason is because it makes a part of his estate; it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal, it is beyond the reach of contract. In the same sense we say of many rights they are inalienable. No one would pretend that a man's person could be specifically affected by contract; though he should bind himself by indenture, equity could not enforce the agreement. *Mary Clark's* case, 1 Blackf. 122. So of a man's absolute personal rights in general, as his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, etc." This case was approved in *McKee* v. *Judd,* 12 N. Y. 622, and it was there said by GROVER, J., that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable; but that all others are." In *Green* v. *Hudson R. R. Co.,* 28 Barb. 9, approved in *Whitford* v. *Panama R., supra,* it was held that the husband at common law could not maintain an action for negligence causing the death of his wife, and that continued to be the law in this State until the act of 1847 was amended by chapter 78 of the laws of 1870. It was said by Judge DENIO in *Whitford* v. *Panama R. Co., supra,* "It has never been suggested, so far as I know, that the personal representatives of a deceased person could at the common law sustain an action on account of the wrongful act of another, which caused the death of the person whose estate they represent." It would seem unnecessary to cite additional authorities to the effect

that as the law stood at the adoption of the statute, neither a husband nor wife had such an interest in the life of their respective consorts as subjected a person, through whose negligent act it was taken, to the charge of injuring any property rights possessed by them.

From the same review it is quite evident that the authors of the statute intended explicitly to provide for the abatement of causes of action for personal injuries occurring to the plaintiff, or to his intestate or testator. The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down. *People* v. *Tioga Co. Com. Pleas, supra; Zabriskie* v. *Smith, supra.*

The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute. Such rights as arise out of the domestic relations clearly do not possess the attributes of property. and are not assignable by the possessor. *People* v. *Tioga Co. Com. Pleas, supra; Zabriskie* v. *Smith, supra.*

The provisions of the Revised Statutes were however modified by chapter 450 of the laws of 1847, as amended by subsequent statutes, giving an action against persons and corporations to the representatives of a deceased person for the benefit of the husband or widow and next of kin, to recover damages for the pecuniary injuries suffered by them where death was caused by the wrongful act, neglect or default of another, and the act, neglect or default was such as would (if death had not ensued) have entitled the party injured to maintain an action therefor, and in respect thereof against the person who or the corporation which caused the same, although the death was caused under such circumstances as in law amounted to a felony.

We are now to consider the effect which these statutes produced upon the law as it previously existed. The cause of action here provided for has been held not to be a devolution, but a new one calling for the application of another rule of damage and distinguished by many other attributes. *Whitford* v. *Panama R. Co., supra; Haight* v. *Hayt,* 19 N. Y. 464; *McDonald* v. *Mallory,* 77 N. Y. 546; s. c., 33 Am. Rep. 664; *Littlewood* v. *Mayor, etc.,* 89 N. Y. 24; s. c., 43 Am. Rep. 271; *Blake* v. *Midland R. Co.,* 18 A. & E. 93; *Leggott* v. *Gt. N. R'y Co.,* 1 Q. B. D. 604; s. c., 17 Eng. R. 238; *Russell* v. *Sunbury,* 37 Ohio St. 372; s. c., 41 Am. Rep. 523; *Yer-*

tore v. *Wiswall*, 16 How. Pr. 8. That it is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased, for the pecuniary consequences suffered by the husband, wife or next of kin from such wrongful act, is also established by the same authorities.

The cause of action is obviously the wrongful act, and the pecuniary injuries resulting afford simply a rule to determine the measure of damages. However much the husband, widow or next of kin may suffer pecuniarily by the act causing death it constitutes no cause of action, independent of evidence, that it was occasioned by the wrongful or negligent conduct of another. Proof that it occurred in consequence of the contributory negligence of the deceased person, or without the fault of the defendant, furnishes a perfect answer to such an action and a conclusive reason why the death produced by the wrongful act is the cause of action. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause, seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. *Whitford* v. *Panama R. Co.*, *supra*.

It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

The plain implication from its language would therefore seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. *Dickins* v. *N. Y. Cent. R. Co.*, 23 N. Y. 158; *Vertore* v. *Wiswall*, 16 How. Pr. 8.

The wrong defined indicates no injury to the estate of the person killed, and cannot either logically or legally be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence. The property right therefore created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.

If therefore we consider this cause of action as a property right, it is as such a right based upon a tort, and except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action. The case of *Littlewood* v. *Mayor, etc.*, 89 N. Y. 24; s. c., 43 Am. Rep. 271, holding that such causes of action may be settled and discharged by the injured party during his life-time, would seem to preclude the idea that the husband and widow and next of kin had any right of property in the cause of action created by the death of the party injured during his life-time. The question presented by the decision herein was, we think, determined adversely to the plaintiff by the case of *Cregin* v. *Brooklyn Crosstown R. Co.*, 75 N. Y. 192; s. c., 38 Am. Rep. 474. It was there held when an injury is done to the person of the plaintiff (and necessarily, by the terms of the statute, to that of his testator or intestate), "that the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of the injury to the person. The damages are the consequences merely of that injury, and when, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it." The conclusions reached in that case tend necessarily to support the doctrine that the causes of action given by the act of 1847 and its amendments abate by the death of the person injured. It also holds that so far as the personal estate and rights of property of the deceased person are injured by the wrongful act causing death, the cause of action therefor survives to his representatives by force of section 1 of the Revised Statutes, before referred to. Such an action exists independently of the statute of 1847, and has been upheld in favor of representatives to the extent of

giving damages for medical attendance and inability of the injured party to attend to business, for the time intermediate his injury and death, when the accident occurred while travelling as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely. *Bradshaw* v. *Lancashire & Yorkshire R'y Co.*, L. R., 10 C. P. 189; s. c., 11 Moak Eng. 310.

We have carefully considered the case of *Needham* v. *Grand T. R. Co*, 38 Vt. 294, but inasmuch as the statutes in that State affecting the question are so different from our own, little analogy exists between the question there presented and the one under consideration. The case of *Vertore* v. *Wiswall, supra,* is entitled to great respect from the learning and ability of the court by which it was decided. But although agreeing with some of the propositions entertained by it, we are unable to concur in the conclusion reached, that the cause of action there considered survived.

The complaint in the present action describes a cause of action arising out of the death alone, and suggests no injury to the estate or property of the deceased. Such a cause of action is abated by the death of the wrong-doer.

The judgment of the General Term should therefore be reversed, and that of the Special Term affirmed.

All concur; FINCH, J., in result.

Judgment accordingly.

PEOPLE v. MARX.

(99 N. Y. 377.)

Constitutional law — prohibiting substitutes for butter.

A statute prohibiting the manufacture or sale for food of any substitute for butter or cheese produced from pure unadulterated cream or milk is unconstitutional.

CONVICTION of selling oleomargarine. The opinion states the case.

F. R. Coudert and *Wheeler H. Peckham,* for appellant.

Samuel Hand, for respondent.

RAPALLO, J. The defendant was convicted in the Court of General Sessions of the city and county of New York, of a violation of the sixth section of an act entitled "An act to prevent deception in sales of dairy products." (Chap. 202 of the Laws of 1884.) On appeal to the General Term of the Supreme Court in the first department conviction was affirmed and the defendant now appeals to this court from the judgment of affirmance.

The main ground of the appeal is that the section in question is unconstitutional and void.

The section provides as follows:

"§ 6. No person shall manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer to sell the same as an article of food. This provision shall not apply to pure skim milk cheese produced from pure skim milk." The rest of the section subjects to heavy punishments by fine and imprisonment, "whoever violates the provisions of this section."

The indictment charged the defendant with having on the 31st of October, 1884, at the city of New York sold one pound of a certain article manufactured out of divers oleaginous substances and compounds thereof, other than those produced from unadulterated milk to one J. M., as an article of food, the article so sold being designed to take the place of butter produced from pure unadulterated milk or cream. It is not charged that the article so sold was represented to be butter, or was sold as such, or that there was any intent to deceive or defraud, or that the article was in any respect unwholesome or deleterious, but simply that it was an article designed to take the place of butter made from pure milk or cream.

On the trial the prosecution proved the sale by the defendant of the article known as oleomargarine or oleomargarine butter. That it was sold at about half the price of ordinary dairy butter. The purchaser testified that the sale was made at a kind of factory, having on the outside a large sign "Oleomargarine." That he knew he could not get butter there, but knew that oleomargarine was sold there. And the district attorney stated that it would not be claimed that there was any fraudulent intent on the part of the defendant, but that the whole claim on the part of the prosecution

was that the sale of oleomargarine as a substitute for dairy butter was prohibited by the statute.

On the part of the defendant it was proved by distinguished chemists that oleomargarine was composed of the same element as dairy butter. That the only difference between them was that it contained a smaller proportion of a fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion—from three to six per cent. That it exists in no other substance than butter made from milk and it is introduced into oleomargarine butter by adding to the oleomargarine stock some milk, cream or butter and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in butter made from milk. The only effect of the butterine is to give flavor to the butter, and has nothing to do with its wholesomeness. The oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist who had been employed by the French Government to devise a substitute for butter.

Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargarine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted. The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is, that if in the progress of science, a process is

discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood by it are deprived of that privilege, the capital invested in the business must be sacrificed, and such of the people of the State as cannot afford to buy dairy butter must eat their bread unbuttered.

The references which have been here made to the testimony on the trial are not with the view of instituting any comparison between the relative merits of oleomargarine and dairy butter, but rather as illustrative of the character and effect of the statute whose validity is in question. The indictment upon which the defendant was convicted does not mention oleomargarine, neither does the section (§ 6) of the statute, although the article is mentioned in other statutes, which will be referred to. All the witnesses who have testified as to the qualities of oleomargarine may be in error, still that would not change a particle the nature of the question, or the principles by which the validity of the act is to be tested. Section 6 is broad enough in its terms to embrace not only oleomargarine, but any other compound, however wholesome, valuable or cheap, which has been or may be discovered or devised for the purpose of being used as a substitute for butter. Every such product is rigidly excluded from manufacture or sale in this State.

One of the learned judges who delivered opinions at the General Term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound, as genuine butter or cheese made from unadulterated milk or cream. That it was that design to deceive which the law rendered criminal. If that were a correct interpretation of the act, we should concur with the learned judge in his conclusions as to its validity, but we could not concur in his further view that such an offense was charged in the indictment, or proved upon the trial. The express concessions of the prosecuting officer are to the contrary. We do not think that section 6 is capable of the construction claimed. The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy but-

ter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. The artificial product might be green, red or white, instead of yellow, and totally dissimilar in appearance to ordinary dairy butter, yet it might be designed as a substitute for butter, and if so, would fall within the prohibition of the statute. Simulation of butter is not the act prohibited. There are other statutory provisions fully covering that subject. Chapter 215 of the Laws of 1882, entitled "An act to regulate the manufacture and sale of oleomargarine, or any form of imitation butter and lard, or any form of imitation cheese, for the prevention of fraud, and the better protection of the public health," by its first section prohibits the introduction of any substance into imitation butter or cheese for the purpose of imparting thereto a color resembling that of yellow butter or cheese. The second section prohibits the sale of oleomargarine or imitation butter thus colored, and the third section prohibits the sale of any article in semblance of natural cheese, not the legitimate product of the dairy, unless plainly marked "imitation cheese." Chapter 238 of the Laws of 1882 is entitled "An act for the protection of dairymen, and to prevent deception in the sales of butter and cheese," and provides (§ 1) that every person who shall manufacture for sale, or offer for sale, or export any article in semblance of butter or cheese, not the legitimate product of the dairy, must distinctly and durably stamp on the side of every cheese, and on the top and side of every tub, firkin or package, the words "oleomargarine butter," or if containing cheese, "imitation cheese," and chapter 246 of the Laws of 1882, entitled "An act to prevent fraud in the sale of oleomargarine, butterine, suine or other substance not butter," makes it a misdemeanor to sell at wholesale or retail any of the above articles, representing them to be butter. These enactments seem to cover the entire subject of fraudulent imitations of butter, and of sales of other compounds as dairy products, and they are not repealed by the act of 1884, although that act contains an express repeal of nine other statutes, eight of which are directed against impure or adulterated dairy products, and one against the use of certain coloring matter in oleomargarine. The provisions of this last act are covered by one of the acts of 1882 above cited, and the provisions of the repealed acts in relation to dairy products are covered by substituted provisions in the act of 1884, but the statute di-

rected against fraudulent simulations of butter, and the sale of any such simulations as dairy butter, are left to stand. Further statutes to the same effect were enacted in 1885. Consequently, if the provisions of section 6 should be held invalid, there would still be ample protection in the statutes against fraudulent imitations of dairy butter, or sales of such imitations as genuine.

It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products, against the competition of cheaper substances, capable of being applied to the same uses, as articles of food.

The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature. This we think is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether or not those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same time very comprehensive. The Constitution of the State provides (art. 1, § 1), that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. Section 6 of article 1 provides that no person shall be deprived of life, liberty, or property without due process or law. And the fourteenth amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within

its jurisdiction the equal protection of the laws." These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled then that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. *Live Stock Ass'n* v. *The Crescent City, etc.*, 1 Abb. [U. S.] 398; *Slaughter House Cases*, 16 Wall. 106; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Matter of Jacobs*, 98 N. Y. 98; s. c., 50 Am. Rep. 636. The term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of ANDREWS, J., in *Bertholf* v. *O'Reilly*, 74 N. Y. 515; s. c., 30 Am. Rep. 323, *supra*, the right to liberty embraces the right of man "to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by EARL, J., in *Matter of Jacobs*, *supra*, "one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race.

Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would argu-

ments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is violative of the letter, as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted.

The judgment of the General Term and of the Court of Sessions should be reversed.

All concur. *Judgment reversed.*

GILMAN v. MCARDLE.

(99 N. Y. 451.)

Contract — to support, erect monument, and buy masses.

M., an aged married woman put money in the hands of defendant with directions to use it for the support of herself and husband during their lives; and after the death of both to use the residue to pay their respective funeral expenses, and to erect a suitable monument, and the residue for masses, for the repose of their souls, according to the ritual of the Roman Catholic church, both being Catholics. Defendant accepted the money upon the conditions stated. M. selected the kind of coffin and described the monument she desired, and specified the time for the celebration of the masses. She died first, then her husband, both intestate. Defendant expended a portion of the fund for the purposes specified, leaving a balance to be expended for masses. In an action by the administrator of the husband's estate to recover such balance, *held*, that the trust for support was valid; and as to the surplus there was a valid contract.

ACTION to recover money. The opinion states the case. The plaintiff had judgment below.

Richard L. Sweeny, for appellant.

Wm. L. Snyder, for respondent.

RAPALLO, J. This action is brought by the administrator of James Gilman, deceased, to recover of the defendant certain money which had been placed in his hands by Margaret Gilman, the wife of said James Gilman, a few days before her death. James Gilman survived his wife but a short time. Both died intestate, and the plaintiff, a half nephew of James, took out letters of administration upon his estate. No administration appears to have been granted upon the estate of Margaret Gilman.

The facts of the case are uncontroverted. Only one witness was examined on the trial, and that witness was the defendant.

From his testimony it appears that Margaret Gilman, prior to her death, had money in savings banks. She was about eighty-five years old, and her husband was upward of ninety years of age. They had no descendants, and she supposed or stated to the witness that she had no next of kin, and that her husband had no relatives except a brother who was in a monastery, or some other religious establishment, in Ireland. The defendant was an intimate friend of both, of thirty years' standing. Both were Roman Catholics.

Margaret had several conversations with the defendant in respect to the money which she had in the savings banks. She expressed the desire to get her money out of the banks so that the lawyers would not get hold of it. About a week before her death she sent for the defendant and delivered to him her bank-books, and instructed him to draw the money out of the banks and apply it to certain purposes. He drew the money during her life-time on her written orders. The finding of the trial judge is, that on or about the 23d of August, 1882, said Margaret Gilman placed in the custody of the defendant Henry McArdle, about $2,299, and directed said McArdle to use said money for the support and maintenance of herself and her said husband as long as they lived, and after the death of the survivor of them, to use the residue of said money to pay their respective funeral expenses, and pay for the erection of a suitable monument to their memory, and to expend the amount remaining in his hands, after such payments, for Roman Catholic masses, to be procured by him to be said for the repose of the souls of herself and her said husband; that the defendant received the said sum of money upon the terms and condition stated above, and promised to apply it to the uses and purposes therein mentioned.

Margaret died on or about September 1, 1882, and her husband died on or about October 13, 1882.

The defendant, after receiving the fund, expended a portion of it for the purposes directed, and there is a balance remaining in his hands, for which he is directed, by the judgment appealed from, to account to the plaintiff.

The plaintiff claims in the first place that the transaction as found, created a mere agency, revocable at the pleasure of Mrs. Gilman; that no title to the fund passed to the defendant, and consequently the agency was revoked by her death, and the title to the fund vested absolutely in her husband as her legal representative. This view was sustained by the court below, and was one of the grounds upon which its judgment was placed.

We cannot concur in the view that a mere agency was established. Passing for a moment the questions which arise upon the undertaking of the defendant as to the application of the surplus which might remain after paying for the support of Mrs. Gilman and her husband during their lives, we think that a valid trust was created to provide for such support, which trust placed the fund beyond the control of Mrs. Gilman and vested the title to it in the defendant as trustee. A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law. Such a trust may be created without writing, and the delivery of the property is sufficient to pass the title. Perry Trusts, 586; *Day* v. *Roth*, 18 N. Y. 448. The trust may be for the support of the person who creates it, and is valid except as to creditors. The statute of frauds (2 R. S. 135, § 1) provides that "all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person," clearly implying that they are valid as between the parties. In this case the trust was not merely for the support of Mrs. Gilman, but for that of her husband during his life, and was one which he could have enforced. In *Stone* v. *Hackett*, 12 Gray, 227, it was held that the delivery, without consideration, of certificates of shares in a corporation with blank powers to transfer indorsed, in trust to pay the income to the settler during his life, and at his death to transfer the shares to certain charitable objects, was valid and vested the title to the shares in the trustee, even as against the widow of the settler and this notwithstanding that a power was reserved to the settler to modify the uses or revoke the trust. It was there held that the delivery of the certificates with

assignments of some of them, and powers of attorney to transfer others, was equivalent to a completed transfer, and passed the title to the trustee, and that the reservation of a power to revoke the trust was immaterial, a power of revocation being perfectly consistent with a valid trust. In the present case the delivery of the money was complete, and there was not even the power of revocation reserved. In *Davis* v. *Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272, a depositor in a savings bank delivered her bank-book, accompanied by an assignment of her deposit, to B. upon an oral agreement that B. should draw for her what money she wanted during her life-time and pay the balance, if any, left at her death, to her son, and this was held to be a valid trust.

In this case, at the time of the death of Mrs. Gilman, the title to the fund, or so much of it as had not then been applied, was in the defendant, as trustee, upon a valid trust for the support of her husband so long as he should live. If he had lived long enough this trust might have consumed the whole of the fund, which was not large, and nothing passed to the husband or representatives of Mrs. Gilman, unless it be the contingent right to the surplus, if any should happen to remain after the death of Mr. Gilman, and if it should be held that no valid disposition had been made by Mrs. Gilman of this surplus. So long as he lived he had no legal title to any part of the fund.

The defendant, in pursuance of his promise and undertaking, did apply a portion of the fund remaining to the funeral expenses and monument, as directed by Mrs. Gilman, and no question is made in this case as to these expenditures, but the plaintiff seeks to recover the balance, which according to the directions of Mrs. Gilman, which defendant agreed to carry out, was to be devoted to procuring masses.

The court below held, as to this surplus, that the defendant held it as a mere agent whose authority was revocable, and also, that no valid trust had been created; that there was nothing illegal or contrary to public policy in the purpose to which the defendant had undertaken to devote it, but that as a trust it was void for want of a beneficiary who could enforce it, both of the persons for whose benefit the masses were to be solemnized being dead.

The conclusion of the learned court that a valid trust was not established in respect to the surplus admits of much discussion, and we do not propose now to decide that question. It is said, by

the learned annotator of the 11th edition of Kent's Commentaries (vol. 4, p. 305, note 2), that the essential requisites of a valid trust are, first, a sufficient expression of an intention to create a trust, and second, a beneficiary who is ascertained, or capable of being ascertained; and that outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in the case of *Beekman* v. *Bonsor*, the same learned jurist, in delivering the opinion of this court, says: "A gift to charity is maintainable in this State if made to a competent trustee, and if so defined that it can be executed as made by the donor, by a judicial decree, although it may be void according to general rules of law for want of an ascertained beneficiary." *Beekman* v. *Bonsor*, 23 N. Y. 298, COMSTOCK, J., at p. 310.

Whether the doctrine above enunciated has in this State undergone any change, or whether the disposition made by Mrs. Gilman can, in respect to the surplus in controversy, be construed as a charitable, pious or religious use, and sustained on that ground, are questions upon which we reserve our opinion.

The learned judge who rendered the judgment in the present case expressed the opinion that the disposition in question would have created a valid trust if contained in a will, though not valid under the circumstances of this case as a disposition *inter vivos*, but it seems to us that any trust of property which would be valid if created by will, can be created by the owner of the property in his life-time, provided it is then to go into operation, although it is to be executed after his death, and that in the case of money or personal property, it may be created by oral agreement accompanied by a transfer or delivery of the property, and that such delivery will pass the title to the property, and that as a trust its validity is to be tested by the same rules whether it be created by will or by contract *inter vivos*.

In *Matter of Schouler*, 134 Mass. 426, a case very similar to this was decided. The deceased by an informal testamentary writing authorized the Rev. T. L. after her death to withdraw from a savings bank the contents of her bank-book and to dispose of them, part for her funeral expenses and the residue for "charitable purposes, masses," etc. The court held that the terms of the bequest clearly manifested the intention to create a trust in the Rev. T. L., and that it was valid; that masses were religious ceremonials of the

church of which she was a member, and came within the religious or pious uses which are upheld as public charities, citing the case of *Jackson* v. *Phillips*, 14 Allen, 539, 553. Rev. T. L. having died, the Supreme Court appointed Archbishop Williams trustee in his place, and ordered the administrator *de bonis non* of the deceased to pay the money to him, to be applied according to the directions of the will.

By reference to the case cited it will be seen that in the State of Massachusetts the English doctrines on the subject of charitable uses and the *cy pres* doctrine still prevailed, and on that ground the court upheld a trust which by reason of its indefiniteness, if for no other reason, could not be sustained in this State.

But in the case before us, even if it could be conceded that the agreement under which the defendant received the money could not be sustained strictly as a trust, on the ground of the want of a beneficiary to enforce it, it would not follow that it was of no effect whatever. As a trust the same objection, if valid, existed to the undertaking to apply the fund to defraying the funeral expenses of the deceased and her husband, and to the erection of a monument to their memory, but it would be a great abridgment of the rights of property to deny to any person the power, in his life-time, to enter into a contract to be performed after his death by another person, to do or procure to be done any act not objectionable as against any rule of law, morals or public policy, and to pay the consideration for the performance of such contract. It appears in this case that the defendant was an undertaker; that the deceased selected the kind of coffin she desired, and described the monument she wished erected, and specified the times at which the masses were to be solemnized, and the finding of the court is that the defendant received the money on the terms stated by the deceased, and promised to apply it to the uses and purposes therein mentioned. There was no indefiniteness about this contract and it was easy of performance. There certainly can be no legal objection to a person contracting in his life-time for his funeral, his coffin and his monument, and even for the solemnization of masses and paying for them in advance, and if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure those things. Suppose a person should desire in his life-time to provide for the writing of his biography, the publication of his literary works, the painting of his portrait, or the erection of a

statue to his memory after his death. He certainly can make a valid contract with any person to do either of those things, and pay for them, and although they may be personal to himself and for the gratification of his own feelings and perhaps his vanity, and he cannot, in strictness, create a trust for the purpose because there will be no beneficiary, as he will not live to enforce it, why should he not be at liberty in his life-time to contract with some person of his confidence to procure them to be done, and as a consideration for such agreement, to pay him the sum necessary to defray the expense. Such a contract could be enforced by the legal representatives of the promisee, and in case of a refusal to perform they could recover the consideration paid. It certainly must be in the power of a person to provide, either by will or contract, for matters of this description, and I can see no legal reason why he should be confined to a testamentary direction. It is only in respect to dispositions of property which are not to have any effect except upon the death of the owner and are revocable, that he is confined to a will. If they operate *in presenti*, they are valid as contracts even though they are not to be carried into execution until after the death of the party making them, or may be contingent upon the survivorship of another. *Matter of Diez*, 50 N. Y. 93. Even an agreement *inter vivos* that one shall by will bequeath to another a sum of money is valid, though the promised bequest cannot take effect until after the death of the promisor.

Where money is paid by A. to B. on the promise of B. to invest or employ it in a specified, definite and lawful manner, a valid contract is made, and I can see no reason why the contract may not be to employ the money, in the specified manner, after the death of A. If there is an ascertained beneficiary interested in the performance of the agreement he can, after the death of A., enforce it as a trust. If there is no such beneficiary the right to enforce it as a contract, or in case of refusal to perform, to recover the consideration paid, passes to the legal representatives of A. Of course all this is subject to the reservation that there is nothing in the contract which violates any law, even the statutes against perpetuities.

In this case the agreement was to expend the surplus, if any should remain after providing for the support of Mrs. Gilman and her husband and their funeral expenses and monument, in procuring certain masses to be solemnized according to the ritual of the

Roman Catholic church, of which they were members, a duty quite definite and easy of performance on payment of the customary charges. We concur with the court below in holding that there was nothing illegal in the purpose, nor can any person rightly complain that it involved any injustice. The money was her own. She disregarded no ties of kindred, for she had none, and she undertook to devote her little accumulations to the benefit of herself and her aged husband so long as they might live, and to securing them a becoming burial, to be followed by those religious ceremonies which according to their belief were important; but we cannot concur in holding that a mere agency was intended to be created. Such a theory is conclusively refuted by the nature of the contract itself. The title to the money delivered by Mrs. Gilman to the defendant vested in him as trustee under the first trust, for the support of herself and her husband during their lives, which was irrevocable. The undertaking as to the contingent surplus was not to be performed as agent for either of them, for it could not be performed until after their death, when there would be no principal. The intention, manifestly, was that the title to the money should pass to the defendant in consideration of his promise that he would expend an equivalent sum in the designated masses, and this was the substance of the contract.

We are of opinion that this contract was valid, and that the representatives of Mrs. Gilman had no right of action except in case of a breach of the contract by the defendant. Whether the representatives of Mr. Gilman had any right of action in any event is a question not determined in this case. No breach or intended breach being charged, we think the plaintiff established no cause of action, and his complaint should have been dismissed.

As the case comes before us on a conceded state of facts, and only a question of law is presented, the judgment appealed from should be reversed and the complaint dismissed, with costs.

Judgment accordingly.

All concur, except ANDREWS and FINCH, JJ., dissenting; EARL, J., concurring on the ground that there was a valid trust.

PEOPLE v. KEELER.

(99 N. Y. 463.)

Constitutional law — rights of witness before legislative committee — contempt.

The senate of New York directed its committee to investigate certain charges of fraud and irregularity made against the commissioner of public works of the city of New York. The relator, summoned as a witness before that committee, was at first allowed counsel. Having declined to answer certain questions on the advice of his counsel, the committee revoked the privilege of counsel. The counsel thereupon instructed him to withdraw and answer no further questions. He withdrew without the permission of the committee after being notified that his examination was not concluded. *Held*, a contempt, for which the senate might punish him.

HABEAS CORPUS. The opinion states the case. The discharge was refused by the Oyer and Terminer, and that order was reversed at General Term.

Nathaniel C. Moak and *Fred. W. Whitridge*, for appellant.

Thos. C. E. Ecclesine and *Hamilton Harris*, for respondent.

RAPALLO, J. The return to the writ of *habeas corpus* in this case showed that the relator was held by the sheriff in his custody by virtue of a commitment issued by the president and clerk of the senate of this State on the 28th of February, 1884, a copy of which commitment was annexed to the return.

This commitment recited in part the proceedings leading to its issuance, and the relator put in a traverse to the return setting forth such proceeding in full and in detail. The case was heard before the Court of Oyer and Terminer of Albany county upon the petition for the writ of *habeas corpus*, the writ, the return thereto, and the traverse of such return, and it was thereupon ordered that the proceedings be dismissed and the relator remanded to the custody of the sheriff. On appeal to the General Term this order was reversed and the relator was discharged from imprisonment.

From the return and traverse and the recitals contained in the resolutions therein set out, it appears in substance that charges of fraud and irregularity having been made by the public press and

others against the commissioner of public works in the city of New York, the senate on the 14th of January, 1884, adopted a resolution directing and empowering its standing committee on the affairs of cities to investigate the department of public works in said city, with power to send for persons and papers, and to report the result of such investigation and its recommendations concerning the same to the senate; that the relator being summoned to appear and testify before such committee, attended, and after having been examined at considerable length, declined to answer certain questions propounded to him by the committee, and refused to be further examined, and retired from the presence of the committee without their permission.

These facts having been reported by the committee to the senate, that body on the 25th of February, 1884, directed its president to issue his warrant to the sergeant-at-arms, commanding him to arrest the relator and bring him before the bar of the senate to answer why he should not be punished as guilty of a contempt of its dignity and authority. A warrant having been accordingly issued, the relator was, on the 27th of February, 1884, brought before the bar of the senate and there arraigned, by its order, for a breach of its privileges in disobeying a subpœna issued by its committee on cities to appear before said committee and give testimony upon an investigation then pending before it, and in refusing to answer proper questions put by said committee, and in refusing to be further examined before said committee, and he was thereupon called upon for his answer to the charge. He requested to answer by counsel, which request was granted, and after counsel had been heard in his behalf, a resolution was adopted requiring the committee on cities to report all the testimony and proceedings had by the committee in relation to the relator, on the following day.

On the 28th of February the report was presented and was afterward, by resolution, made a part of the record in the further consideration of the case. From this report it appears that the relator was allowed to be attended and advised by counsel, during his examination before the committee; that on various questions being propounded to him he was instructed by his counsel not to answer and being required by the committee to answer them, he declined to do so on the ground of the advice of his counsel. After numerous refusals to answer of this description the committee, on motion directed that its chairman no longer recognize the right of the wit-

ness to have any counsel present. Thereupon the counsel instructed the witness to withdraw from the committee and leave with him. The chairman stated to the witness that if he did, it would be at his peril, and he replied that he took the peril of it. He was informed that his examination was not concluded, and was advised by the chairman not to leave, and the witness replied that he would take the consequences.

This report of the committee having been presented to the senate, on the hearing before it on the 28th of February, the relator, on that day, presented to the senate his affidavit, in which he alleged that he was advised and believed that he was entitled, in any examination held by said committee, to the benefit of the advice and assistance of counsel, as a matter of right and not of courtesy, and that he was advised and believed that the questions he refused to answer, under the advice of counsel, were improper and immaterial in that they sought to elicit facts touching his private business, apart from his connection with the department of public works, into which said committee had no authority or warrant of law to inquire, and that he was prepared then to attend before the committee accompanied by his counsel, and subject to his advice, to answer all proper and material questions which the committee were authorized by law to ask.

The relator being again brought before the bar of the senate and asked by the president whether he was willing to appear before the committee and answer the questions which he had refused to answer, he replied that he would do so by the advice of counsel. The senate thereupon, on the 28th of February, 1884, adopted a resolution as follows: "Resolved, that William McDonald is declared to be in contempt of the senate for refusing to answer, as a witness, pertinent questions propounded by the standing committee on cities in the investigation of the department of public works of the city of New York, and for quitting the presence of the committee pending his examination as a witness." Being again brought to the bar and asked the same question as before, he answered, in writing, that he was willing to appear before the committee and answer all proper and material questions if allowed the advice and assistance of counsel. Thereupon the senate adopted the following resolution: "Resolved, that William McDonald having been declared to be guilty of a contempt of the senate, and being convicted thereof for refusing to answer, as a witness, pertinent questions propounded

by the standing committee on the affairs of cities of the senate in the investigation of the department of public works in the city of New York, and being summoned as a witness and appearing before the committee, for refusing to submit to an examination, as a witness, before such committee, on the subject of said investigation, and quitting the presence of said committee, be and he hereby is remanded into the custody of the sergeant-at-arms, and is hereby sentenced to be, by said sergeant, imprisoned in the county jail of Albany county, there to remain until he shall consent to appear before the standing committee on the affairs of cities, as a witness, and answer the questions put to him by the said committee in the matter of said investigation, said imprisonment however not to extend beyond the final adjournment of the present legislature; and the keeper of the said common jail of the county of Albany is hereby commanded to receive said William McDonald and him safely keep and imprison in said jail until the adjournment of the present legislature, unless sooner discharged by order of the senate."

In pursuance of this resolution the commitment in question was issued by the president and clerk of the senate and directed to the sergeant-at-arms and the sheriff of the county of Albany, and the relator was accordingly imprisoned in the county jail. The broad ground is now taken on the part of the relator that the senate had no jurisdiction or power to adjudge him guilty of the contempt with which he was charged or to imprison him therefor.

It is needless to enter upon the discussion of the proposition urged on the part of the appellant and disputed by the respondent, that the power to commit or punish for contempt which has been exercised by Parliament in England, is vested in the senate and assembly of this State, either by virtue of our adoption of the common law of England, or by reason of such a power being inherent in legislative bodies; for since the year 1830 the whole subject has been regulated in this State by statutory provisions, which if constitutional, must control.

Title 2, chapter 7, part 1 of the Revised Statutes, entitled "of the powers, duties and privileges of the two houses and their members and officers," provides as follows (§ 13): "Each house has the power to punish as a contempt and by imprisonment a breach of its privileges, or of the privileges of its members, but such power shall not hereafter be exercised except against persons guilty of one or more of the following offenses:

1. The offense of arresting a member or officer of the house in violation of his privilege from arrest as hereinbefore declared.

2. That of disorderly conduct in the immediate view and presence of the house, and directly tending to interrupt its proceedings.

3. That of publishing any false and malicious report of the proceedings of the house, or of the conduct of a member in his legislative capacity.

4. That of refusing to attend or be examined as a witness either before the house or by a committee to take testimony in legislative proceedings.

5. That of giving or offering a bribe to a member, or of attempting by menace or any other corrupt means or device, directly or indirectly, to control or influence a member in giving his vote, or to prevent him from giving the same."

The five enumerated offenses are the only ones which either house is authorized to punish as contempts, and they take the place of the numerous offenses and acts which were treated by Parliament as contempts, and in place of the varied and severe punishments inflicted by Parliament for such contempts, the statute above cited provides (§ 14) that, "in all cases in which either house shall punish any of its members or officers, or any other person by imprisonment, such imprisonment shall not extend beyond the same session of the legislature."

[Omitting a minor consideration.]

At the time of their enactment, as appears by the note of the revisers, it was assumed that although the State Constitution of 1821 was silent upon the subject of the privileges of the legislature or of either house, yet that it was not intended to deprive the two houses of the power which the revisers characterized as indispensable, of punishing contempts, which it had then been determined by the Supreme Court of the United States, in the case of *Anderson* v. *Dunn*, 6 Wheat. 204, was possessed by the houses of Congress by necessary inplication, the Constitution of the United States being equally silent upon the subject, and it was deemed proper to provide a legislative definition of those privileges of the houses and their members, the breach of which should be regarded as a contempt. With this view the new provisions were framed. See note to tit. 2, chap. 7, part 1, R. S.

The case of *Anderson* v. *Dunn*, *supra*, was an action for assault and false imprisonment against the sergeant-at arms of the house

of representatives. The defendant pleaded in justification a resolution of the house which recited that the plaintiff had been guilty of a breach of the privileges of the house and of a high contempt of the dignity and authority of the same, and that under a warrant issued by the speaker by authority of the house. the plaintiff had been brought to its bar and heard in his defense, and adjudged to be guilty, and ordered to be imprisoned. The plea was held good on demurrer, though neither the nature of the contempt nor the evidence of it appeared. A general power to punish for contempt was held to be vested in the house as necessarily incident to the exercise of its functions, and its adjudication was held sufficient to establish the fact of the contempt.

In the later case of *Kilbourn* v. *Thompson*, 103 U. S. 168, which was a similar action, the plaintiff had, on proceedings similar to those taken in the present case, been convicted of a contempt and sentenced by the house of representatives to imprisonment. It appeared on the face of the proceedings that the contempt consisted of his refusal to answer a question propounded by a committee of the house appointed by a resolution. which was set forth. This resolution directed the committee to investigate certain business transactions in which the United States government was interested simply as a creditor of one of the parties, and the Supreme Court held that the preamble and resolution under which the committee was appointed showed upon their face that the investigation ordered did not have for its object any legislative action or the impeachment of any officer of the government, but the collection of a debt owing to the government, a power which Congress could not exercise, but which was vested only in courts of justice; that in ordering such an investigation the house of representatives exceeded the limits of its powers and consequently the committee had no authority to require the plaintiff to testify before it. On this sole ground the decision of the court was placed, but in arriving at this conclusion several important points, which have a bearing upon the question now before us, were discussed in the highly instructive opinion of MILLER, J.

The case of *Anderson* v. *Dunn*, in so far as it held the resolution of the house finding the plaintiff guilty conclusive was distinctly overruled.

This decision necessarily involved the point stated in other parts of the opinion, that a legislative body is not to be assimilated to a

court of general jurisdiction; that Congress has no general power of adjudicating upon contempts. The reasoning and authorities upon which this decision is based convince us that it is incontestible. *Stockdale* v *Hansard*, 9 Ad. & El. 1; *Keely* v. *Carson*, 4 Moore P. C. 63 (opinion of COLERIDGE, J.); *Burnham* v. *Morrissey*, 14 Gray, 226.

The case of *Anderson* v. *Dunn* was also distinguished in *Kilbourn* v. *Thompson* on the ground that as the plea in the first-mentioned case did not disclose the ground on which the plaintiff had been held guilty of contempt, it was no precedent for a case where the plea established by its recital of the facts that the house had exceeded its authority. It was also held following a course of reasoning which need not be repeated here, that the right of the house of representatives to punish a citizen for a contempt of its authority derived no support from the precedents and practice of the two houses of the English Parliament nor from the adjudged cases in which the English courts have upheld those practices. That the powers of Congress were derived solely from the Federal Constitution, and that such as were not conferred by that instrument, either expressly or by fair implication, were reserved to the States respectively or to the people, and that while the house had power to punish contempts by fine and imprisonment in certain cases it had no general jurisdiction on the subject, but was confined to those cases where the power was expressly conferred by the Constitution or was necessary to enable the house to exercise its lawful functions. Express power is given by the Constitution to each house to punish its members for disorderly behavior and to compel the attendance of absent members under such penalties as the house may prescribe, and the opinion concedes that among the incidental and implied powers of Congress may be that of compelling attendance of witnesses and punishing contumacious witnesses in the same manner as could be done by a court of justice in dealing with cases which Congress is empowered to decide, such as the election and qualification of its members, the trial of a contested election and proceedings in the house to impeach officers of the government. Whether their power over recusant witnesses extends beyond those cases, the court in reviewing the case of *Anderson* v. *Dunn*, expressly declines to decide, but the court does emphatically declare that whether the power of punishment in either house by fine or imprisonment goes beyond the specified cases or not, no person can be punished for

contumacy as a witness before either house, unless his testimony is required in a matter into which the house has jurisdiction to inquire, and that neither of those bodies possesses the general power of making inquiry into the private affairs of the citizen. To the like effect is the opinion of the Supreme Court of Massachusetts in the case of *Burnham* v. *Morrissey*, 14 Gray, 226. "The house of representatives has the power under the Constitution to imprison for contempt, but the power is limited to cases expressly provided for by the Constitution or to cases where the power is necessarily implied from those constitutional functions and duties to the proper performance of which it is essential."

It must be borne in mind that the cases cited did not arise under any act of Congress, authorizing either house to punish contumacious witnesses, for there is no such act. The question was, whether a general power to punish contempts was inherent in Congress as necessary to the exercise of its functions, independent of any statute. That such a power could be exercised to compel the attendance of witnesses in certain cases was conceded. Whether it existed in cases of investigations properly instituted for purposes of legislation was left an open question. So far as the statutes of the United States were concerned, a different course of proceeding was prescribed. The act of January 24, 1857 (chap. 19), provided that any person summoned as a witness before either house or a committee thereof, and refusing to appear or to answer any question pertinent to the matter in consideration, should, in addition to the pains and penalties then existing, be liable to indictment and punishment as for a misdemeanor, and it was made the duty of the president of the senate to certify the fact to the district attorney for the District of Columbia, who was required to lay the matter before the grand jury. This act was incorporated with modifications in the Revised Statutes of the United States. (§§ 102, 104.) The other pains and penalties alluded to must have had reference to the supposed power to punish for contempt. But if, as contended, no such power can be exercised by Congress under the limited authority delegated to it by the Constitution, the power could not be created and conferred by any statute

The case now before us is entirely different. It arises under a statute enacted by the legislature of the State of New York. The inquiry is not whether the power to enact such a law is to be found in the State Constitution, but whether such legislation is prohibited

or restrained by that instrument, or by the Constitution of the United States. Except as thus limited the State legislature possessed the whole legislative power of the State. *Bank of Chenango* v. *Brown*, 26 N. Y. 469; *People* v. *Dayton*, 55 N. Y. 380.

The only express provision of the Constitution which is claimed to be violated is that which declares that no person shall be deprived of life, liberty or property without due process of law. If the statute in question was within the power of the legislature to enact, the proceedings against the relator were due process of law. He was imprisoned by virtue of a pre-existing law, informed of the charge made against him, and was heard in person and by counsel in his defense. The proceedings need not be according to the course of the common law, *Happy* v. *Mosher*, 48 N. Y. 313; *People* v. *Supervisors*, 70 N. Y. 228, and we necessarily come back to the question whether the legislature had the power to enact the law.

But the main ground upon which the statute is assailed is, that it confers upon each of the two houses a power which is in its nature judicial, to hear, adjudge and condemn; that no such power can be conferred by the statute upon the legislature itself or either branch thereof; that the Constitution gives the senate and assembly only legislative power, and that judicial power is vested in the courts named in the Constitution, and in such inferior courts as may be created, and that the grant of judicial power to the courts is an implied prohibition of its assumption by the legislature, except as authorized by the Constitution.

The Constitution of the United States declares in terms that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish. Although no similar declaration is contained in the Constitution of this State, still it is a recognized principle that in the division of power among the great departments of government, the judicial power has been committed to the judiciary, as the executive power has been committed to the executive department, and the legislative to the legislature, and that body has no power to assume the functions of the judiciary to determine controversies among citizens, or even to expound its own laws so as to control the decisions of the courts in respect to past transactions. *People* v. *Supervisors*, 16 N. Y. 432. To declare what the law shall be is a legislative power; to declare what it is or has been is judicial. THOMPSON, J., in *Dash* v. *Van Kleeck*, 7 Johns. 498; s. c., 5 Am.

Dec. 291. But notwithstanding this general division of powers, certain powers in their nature judicial are, by the express terms of the Constitution, vested in the legislature. The power of impeachment is vested in the assembly. Each house is made the judge of the qualification and election of its own members. The power of removal of certain judicial officers is given by the Constitution to the senate and assembly, and may involve injuries judicial in their nature, and by statute certain other officers may be removed by the senate on recommendation of the governor. 1 R. S. 123, § 41. I think it would be going too far to say that every statute is necessarily void which involves action on the part of either house partaking in any degree of a judicial character, if not expressly authorized by the Constitution. Where the statute relates to the proceedings of the legislative body itself, and is necessary or appropriate to enable it to perform its constitutional functions, I cannot regard it as such an invasion of the province of the judiciary as should bring it within any implied prohibition of the State Constitution. That instrument contains no express provision declaring any of the privileges of the members of either house, except that for any speech or debate in either house, the members shall not be questioned in any other place. Even the privilege of exemption from arrest during the sessions is not declared. No power to keep order or to punish members or others for disorderly conduct, or to expel a member, is contained in the State Constitution as it is in the Constitution of the United States. All these matters are in this State left under the regulations of the statutes, and there is not even express authority to enact such statutes. 1 R. S., chap. 7, tit. 2. The necessity of the powers mentioned is apparent, and is conceded in all the authorities (see Cooley Const. Lim. 133), yet it is equally apparent that statutes upon the subject must authorize some action partaking of a judicial character. If that feature is a fatal objection, it annuls all the statutory provisions in which it appears.

The power of obtaining information for the purpose of framing laws to meet supposed or apprehended evils is one which has from time immemorial been deemed necessary and has been exercised by legislative bodies. In this State it does not rest upon precedent merely but is expressly conferred by statute (1 R. S. 158, §§ 1, 2), which provides that every chairman of a committee, either of the senate or assembly, or of any joint committee, is authorized to ad-

minister oaths to witnesses, and when the committee is by the terms of the resolution appointing it authorized to send for persons and papers, the chairman has the power, under the direction of the committee, to issue compulsory process for the attendance of any witness within the State whom the committee may wish to examine, and to issue commissions for the examination of witnesses out of the State. To subject a witness to punishment as for a contempt, the testimony sought must, as has already been shown, relate to a legislative proceeding. 1 R. S. 154, § 13, subd. 4.

It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation and the remedy required, and irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I cannot yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. To await the slow process of indictment and prosecution for a misdemeanor might prove quite ineffectual, and necessary legislation might be obstructed, and perhaps defeated, if the legislative body had no other and more summary means of enforcing its right to obtain the required information. That the power may be abused is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds, and when these are exceeded, a jurisdictional question is presented which is cognizable in the courts. My conclusion is that subdivision 4 of section 13, 1 Revised Statutes, is constitutional and valid. These views are supported by the decision of this court in *Wilckens* v. *Willet*, 1 Keyes, 521, 525, where it was held that the house of representatives of the United States had the power to compel the attendance of witnesses. In that case this court said per JOHNSON, J.: "That the power exists, admits of no doubt whatever. It is a necessary incident of the sovereign power of making laws, and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation. The power is rather judicial in its nature; but in a legislative body exists as an auxiliary to the legislative power only," and further at page 526. The power to punish for disobedience and contempt in refusing to attend is a necessary incident to the power to require

and compel attendance. 4 Ct. of App. Dec. 596; 10 Abb. Pr. 164; 12 Abb. Pr. 319. It was in deference to this decision, and to the case of *People* v. *Learned*, 5 Hun, 626, that WESTBROOK, J., sitting in the Oyer and Terminer, dismissed the writ of *habeas corpus* in this case, at the same time delivering a learned and able opinion in support of the opposite view, which has been of much service to the court in examining the case. The learned judge treats the case of *Wilckens* v. *Willet* as based upon the reasoning in *Anderson* v. *Dunn*, and the latter case as overruled in *Kilbourn* v. *Thompson*, but a careful examination shows that the case of *Anderson* v. *Dunn* was overruled in *Kilbourn* v. *Thompson* only in so far as it recognized a general power in the house to punish for contempts, and the conclusiveness of its judgment; while in regard to the proposition that the power exists for the purpose of compelling the attendance of witnesses as auxiliary to the legislative power, the opinion in *Kilbourn* v. *Thompson* (p. 189), said in terms that that proposition was one which the court did not propose to decide in the case then before it, as it was able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function. Throughout this Union the practice of legislative bodies, and in this State, the statutes existing at the time the present Constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute.

Two other points are presented on this appeal. One is that the investigation on which the relator was sought to be examined was one which the house was not authorized to institute, and that the case therefore falls within the decision in *Kilbourn* v. *Thompson*, and the other that the questions which the relator refused to answer were not pertinent or proper. This second point we do not deem it necessary to discuss because the contempt charged consisted not merely of the relator refusing to answer those questions, but of his refusing to be further examined, or to remain in attendance upon the committee, though informed that his examination was not concluded, and warned not to leave, and that if he left he did so at his peril.

[Omitting further discussion.]

We are finally brought to the consideration of the important and more doubtful question, whether the investigation which the committee was conducting was a legislative proceeding which the house was authorized to institute. This is a jurisdictional question, for the statute applies only to such proceedings, and if the house had any authority independently of the statute, that must depend upon the question whether the testimony was sought for the purpose of aiding it in the performance of any of its constitutional functions. An investigation instituted for the mere sake of investigation, or for political purposes, not connected with intended legislation, or with any of the other matters upon which the house could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses and no legislation was contemplated, but the proceeding must necessarily end with the investigation, would not, in our judgment, be a legislative proceeding or give to either house jurisdiction to compel the attendance of witnesses or punish them for refusing to attend. Where public institutions under the control of the State are ordered to be investigated, it is generally with the view of some legislative action respecting them, and the same may be said in respect to public officers. In *Kilbourn* v. *Thompson*, the court said (p. 193): "If any purpose had been avowed to impeach the secretary the whole aspect of the case would have been changed," but the court held that the recitals in the resolution repelled any such idea, and (pp. 194, 195) that no hint of any intention of final action by Congress on the subject appeared in the resolution, and that on the argument no suggestion had been made of what the house of representatives or Congress could have done in the way of remedying the alleged wrong; and they held that that was simply a fruitless investigation into the personal affairs of individuals which could result in no valid legislation on the subject to which the inquiry referred, and therefore that the house had no authority in the matter.

In the present case the language of the resolution was as follows:

"WHEREAS, Grave charges of fraud and irregularity have been made from time to time by the public press and recently by the Union League Club of the city of New York, against Hubert O.

Thompson, commissioner of public works in the city of New York; and

"WHEREAS, These charges have in the opinion of many persons never been satisfactorily explained or fairly refuted; and

"WHEREAS, It is of vital importance to all the tax payers of the State that the heads of all public departments should be beyond reproach, therefore be it

"*Resolved*, That the standing committee on the affairs of cities of the senate be and it hereby is directed and empowered to investigate the department of public works in the city of New York, with power to send for persons and papers, and said committee is hereby authorized to employ a stenographer and such counsel and accountants as it may deem necessary for the thorough discharge of the duties hereby imposed. Such commtttee to report the result of such investigation, and its recommendations concerning the same, to the senate on or before the fifteenth day of April next."

If the resolution had shown upon its face that the only purpose of the investigation was to satisfy the tax payers of the State as to the truth of the charges, or to relieve the department from reproach, and no further action was contemplated or could be had in the matter by the legislature, the case would fall within the decision in *Kilbourn* v. *Thompson*. But such was not the case. The department of public works was created and its duties prescribed by a statute of a State, and if the system was so defective as to admit of frauds or irregularities which could be guarded against by further statutory regulations, it was in the power of the legislature to enact them. That some action of this nature was in contemplation is indicated by the provision in the resolution requiring the committee to report the result of its investigation and its recommendations concerning the same. The legislature had no power to remove the commissioner or any officer of the department, and the only action the committee could recommend would be appropriate legislation to prevent a recurrence of the frauds or irregularities, if they were found to exist, and to be of such a nature that they could be prevented or rendered more difficult by legislation. We are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed, and we have no right to assume that the contrary was intended. The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the

judiciary, forbids interference by the latter with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers.

I have reached the conclusion on the whole case that the order of the General Term should be reversed and that of the Court of Oyer and Terminer affirmed, except in so far as it remands the relator to the custody of the sheriff, the term of his imprisonment having ended with the session of the legislature.

Ordered accordingly.

All concur.

Brigg v. Hilton.

(95 N. Y. 517.)

Sale — warranty - retaining article.

Where goods are sold with warranty of quality, the purchaser on discovering a breach is not bound to rescind, but may use the goods and rely on the warranty.*

ACTION for price of goods. The opinion states the point. The defendant had judgment below.

A. Blumenstiel, for appellant.

Horace Russell, for respondent.

DANFORTH, J. [Omitting other questions.] It was proved that the goods were delivered in August and September, and paid for in October and November. The defendants therefore had ample opportunity to examine them, and had they done so it is conceded that the defects now complained of would have been discovered. These circumstances are also relied upon by the plaintiffs as an answer to the defendants' counter-claim. But where a sale is made in good faith, with a warranty of quality as part of the contract, it is sometimes said to be not even voidable (Pollock Cont. 422; *Voorhees* v. *Earl,* 2 Hill, 288, where the English cases and others are examined), and at other times that the vendee is not bound to rescind the contract, but may if he elects, use the article and rely upon the warranty. The first part of this proposition was thought

* To same effect, *Downing* v. *Dearborn,* 77 Maine.

by PECKHAM, J. (*Day* v. *Pool*, 52 N. Y. 416; s. c., 11 Am. Rep. 719), to be regarded as settled in this State, but it is not material here. The defendants stand, if at all, on the last alternative, and are supported by *Muller* v. *Eno*, 14 N. Y. 597, a case very much like the present. The goods there in question had indeed been manufactured, but at the time of sale were in the bonded warehouse unopened, and were thence delivered to the purchaser in the original packages. I do not see that this circumstance at all affects the principle on which the rights of the parties depend. In the case cited the sale was by sample, with warranty that the goods corresponded with it. In the case before us specimens of cloths were exhibited to the purchaser, with a warranty that those to be furnished should be of like quality. In both the articles shown were sound goods. It is difficult to see why in one case as in the other the party promising should not perform his engagement, or failing to do so, render just compensation to him who relied upon the promise. Nor can it be material whether the liability for breach of warranty is enforced by a direct action for damages, or by way of a counter claim, or when sued for the price, as in *Muller* v. *Eno*, *supra*, by way of recoupment. In that case it is said the claim is not barred by the continued possession of the goods by circumstances of delay in giving notice to the vendor, nor even by omitting altogether to give such notice and using or selling the property. Although the articles when ordered had no existence, the contract between the parties was an executory agreement for sale of goods and not for work or labor in producing them; so was that in *Muller* v. *Eno*, *supra*. In each case there was an express warranty. The rule there applied seems decisive of the question before us.

In *Day* v. *Pool*, 63 Barb. 506; affirmed in this court, 52 N. Y. 416; s. c., 11 Am. Rep. 719, the circumstances were in a more literal sense like those before us. The action was for an alleged breach of warranty in an executory contract for the sale and delivery of rock-candy syrup. The defendants were dealers in syrups in the city of New York, and the plaintiffs were wine makers in Chautauqua county. It appears that at the time of sale the syrup was not manufactured, but was subsequently to be procured by the defendants of the manufacturers in Boston. A sample was exhibited and an order given for syrup of that description.

There was also on the part of the vendors an express warranty as to quality. The syrup was delivered in different lots. The evi-

dence warranted a finding, and it was not controverted by the plaintiffs, that the quality of the syrup could be detected on examination before using, and that it was in fact discovered and known to them at the time they used it, but although found not to correspond either in kind or quality with that agreed to be sent, it was not returned, but used and paid for. At the trial the plaintiffs were nonsuited upon the ground that the agreement being executory, and the syrup delivered and received under it with knowledge of its quality, and converted by the plaintiffs to their own use, without notice to the defendants that they would not receive the same upon the contract, or any offer to return it, they could not recover. The nonsuit was set aside, and a new trial granted by the Supreme Court, Fourth Department, after a careful examination of earlier decisions. Upon appeal by the defendant to this court the order was affirmed, and the plaintiffs had judgment absolute upon the ground as stated by PECKHAM, J., that the same rights and remedies should attach to a warranty in an executory as in a present sale, and that where there is an express warranty, the purchaser in neither case is bound to return the property upon discovering the breach, even if he have the right to do so. It is true that in both courts very able judges dissented, but the precedent has been since followed in *Dounce* v. *Dow*, 57 N. Y. 16, and *Gurney* v. *At. & G. West. R. Co.*, 58 N. Y. 358, where the judges who dissented in *Day* v. *Pool* concurred, giving judgment upon the doctrine of that case, and again in *Dounce* v. *Dow*, *supra*, where after a new trial it came to this court, 64 N. Y. 411, and was recognized by the then chief judge, who had dissented in *Day* v. *Pool*, as establishing that by an executory agreement for sale and delivery of an article of a particular quality, a warranty is established which will survive the acceptance of the article.

In *Parks* v. *Morris Axe and Tool Co.*, 54 N. Y. 586, after referring to *Muller* v. *Eno* and *Day* v. *Pool*, the court held in a case properly calling for such decision, that a warranty might accompany an executory contract and be enforced as such. Indeed, the principles of law applicable to either case should now be deemed well settled. If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods, or return them. If the contract is executory, and the goods yet to be

manufactured, no title can pass until delivery or some equivalent act to which both parties assent, and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty he may receive the goods and then the same consequences attach as in the former case, and among others the right to compensation if the warranty is broken.

It would seem therefore that the learned trial judge committed no error in denying the plaintiffs' motion for a verdict in their favor, or in submitting the case to the jury as one in which, if an express warranty was proven, the defendants might have damages.

We agree therefore in the conclusion reached by that court, and think the judgment and order appealed from should be affirmed.

Judgment affirmed.

All concur except RUGER, C. J., not voting.

CASES

IN THE

SUPREME COURT COMMISSION

OF

OHIO.

SMITH BRIDGE COMPANY v. BOWMAN.

(41 Ohio. St. 37.)

Mechanics' lien — on railroad bridge.

A mechanics' lien will attach to a railroad bridge.

FORECLOSURE. The opinion states the point.

E. W. Tolerton and *Harrison, Olds & Marsh,* for plaintiff in error.

Bowman & Bowman, for defendant in error.

NASH, J. The first question presented in this case is: "Did the act of May 4, 1877 (74 Ohio Laws, 168), give the plaintiff in error a lien upon the bridges constructed by it under its contract with the railroad company, and in accordance with the allegations contained in the second count of the answer and cross-petition?" This question is an unsettled one in Ohio, and the Supreme Court, in the case of *Rutherford* v. *Railroad Co.*, 35 Ohio St. 559, was careful to say that it did not decide whether or not a lien like the one now claimed could be taken. The law under which this lien is claimed reads:

"Any person who shall perform labor or furnish machinery or materials for constructing, altering or repairing any boat, vessel or other water craft, or for erecting, altering, repairing or removing any house, mill, manufactory or other building, appurtenance, fixture, bridge or other structure, by virtue of a contract with the owner or owners, his or their authorized agents, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory or other building, appurtenance, fixture, bridge or other structure, and the interest of said owner or owners in the lot of land on which the same shall stand or be removed to."

It will be observed that in describing the bridge, or kind of bridge upon which a lien may be had, the words "any bridge" are used. These words, if given their ordinary meaning include a railroad bridge. No restrictive words, excluding a railroad bridge from the operation of the statute, appear. The statute is so comprehensive that it includes all kinds of bridges.

It has been suggested in argument that we may find that the general assembly did not intend that a lien should extend to railroad bridges. This intent does not appear from the words of the statute. Indeed, they express an intent contrary to that which the defendant in error would have us find.

We have been told that to place a lien upon railroad bridges would seriously interfere with the interest of traffic and trade; that it would be against public policy, as such action would impede the construction of railroads, and that such a lien would be difficult of enforcement. On account of these reasons it is said that the legislature could not have intended to fix this lien upon this class of bridges. These are arguments proper for the legislature to have considered prior to the act of 1874, and which it is presumed to have weighed. If the language used by the legislature in a statute is precise and unambiguous, we conceive it to be our duty to interpret the words in their natural and ordinary sense, although the result may conflict with our ideas of public policy.

The arguments which have been advanced, with force and skill, to exclude railroad bridges from the operation of this statute would apply with equal aptness to bridges owned by turnpike companies.

A turnpike bridge is a part of an entire thing, to-wit: The public road owned by the turnpike corporation. To subject such a bridge to mechanics' liens would seriously incommode the public

and injure traffic and trade. Turnpike bridges belong to a distinctive class of bridges just as plainly as do railroad bridges. It makes a draft upon one's credulity to believe that the legislature when it used the words "any bridge" intended to point out a turnpike bridge, but had no reference to a railroad bridge.

Bridges constructed and owned in Ohio by corporations, organized for that sole purpose, invariably connect parts of a public highway. To subject them to a lien, to sell them and to take them away would seriously interfere with public interests.

Exempt all these bridges from mechanics' liens and all in the way of bridges left to be affected by the statute would be bridges constructed by private persons upon their lands. These are few in number and of little value. We cannot believe that it was the intention of the legislature to give a mechanics' lien upon these alone.

It has also been said that the reason why our statute does not extend mechanics' liens to railroad bridges, is that in the building of great and beneficent public works — such as railroads — such large sums of money are required that it is necessary to authorize the corporation building them to mortgage their present and future property, together with their franchises and income, in order to secure the means necessary to pay the contractors who are to be engaged in the work of construction; that if the lien of this mortgage was to be made subject to a lien by the contractors engaged in building bridges it would be simply impossible ever to obtain the money to build a railroad, excepting through a capital stock ample for that purpose. It does not occur to us that this result would necessarily follow. In Ohio a railroad company is required to have a capital stock, and in most cases it is very large. A railroad company is also authorized to issue bonds and mortgage its property in an amount not exceeding the amount of its capital stock. If the capital stock usually subscribed before the work upon a railroad is commenced is actually paid it would be sufficient to largely forward the work of construction when prudently expended. If this should be done and then a loan made upon mortgage bonds, money enough would be procured to easily complete the railroad and pay all engaged in its construction. The bond-holders would have behind them as security:

1st. The work completed with the money procured by the stock subscriptions.

2d. The work, rolling-stock, equipment, etc., paid for with the money advanced upon their bonds.

3d. The liability which our Constitution and statutes attach to the holders of stock.

Such is the theory of our law in regard to railroad building. The right of a mechanic or builder to have a lien upon a railroad bridge will not interfere with or embarrass companies who propose to build railroads in this way. It may interfere with companies proposing to build railroads entirely upon borrowed money and without any paid up capital stock. If the giving of these liens will have a tendency to cause the theory of our statutes to be practiced, the statute giving the lien is in accord with sound public policy and is promotive of the value and permanency of railroad securities.

In *Railroad* v. *Lewton*, 20 Ohio St. 401, it was held that one who sold a strip of land to a railroad company to be used as a part of its right of way and road-bed, has an equitable lien upon the land so sold. And it was further held in the same case, that "when the right of the public to maintain the continuity of a public highway precludes the right to sell a section of a railroad, a necessity arises to decree the sale of the whole road in order that equity may be done."

In this case the right of the public to maintain the continuity of the Springfield, Jackson & Pomeroy railroad precludes the right to sell the section or sections of the railroad upon which these bridges are situated. It follows then that to protect the lien of the mechanic the sale of the whole road must be decreed.

It appears from the pleadings that under the contract the plaintiff in error built six bridges. Was this contract an entirety for the building of six bridges, or must it be treated as a several contract between the parties for the building of each of the six bridges? As the most certain way of making the character of this contract known we have caused it to be given in full in the statement of facts.

We conclude that it must be treated as one contract and not as six contracts. When the bridge company made this agreement in writing and agreed to its terms, it undoubtedly was influenced by the fact, that it was securing one job of work consisting of several bridges. The railroad company was also governed by the same consideration. The number of bridges to be built is not mentioned in the contract, but it provides for the building of all the bridges upon the line of the road between two specified points. It does not provide a price certain to be paid for each bridge, but this

depends upon the length of the span. The object sought to be accomplished by this contract was not to secure the construction of one bridge, or of two bridges, but of all the necessary bridges between two designated points, so that the road could be operated as a railroad. In its characteristics this contract does not differ from the one which was held to be an entire contract in *Steamboat Wellsville* v. *Geisse*, 3 Ohio St. 333, and we conclude that the contract now in controversy was an entirety and so treat it.

Judgment reversed.

GRANGER, C. J., dissenting.

HOGG v. BEERMAN.

(41 Ohio. St. 81.)

Water and water-course — ownership of land under bay on great lake.

Land under the water of a navigable bay or harbor, on Lake Erie, may be held by private ownership, subject to the public rights of navigation and fishery, by title from an express grant made or sanctioned by the general government.

ACTION to recover lands. The head-note states the point. The defendant had judgment below.

E. B. Sadler, T. S. Magers, and *H. & L. H. Goodwin,* for plaintiff in error.

John M. Semmon, for defendant in error.

GRANGER, C. J. [Omitting other matters.] Is East Harbor capable of private ownership? An absolute sovereign, holding both ownership and jurisdiction of land and water, may vest in a private grantee such portions of either as the grantor may determine. A sovereign whose powers are limited by constitutional provisions may do the like, so far as the grant does not contravene any constitutional provision or limitation. So long as navigable waters are left free to the public, for unembarrassed passages to and fro, we know of no reason why the United States, or any State, holding ownership and jurisdiction of land and water, may not vest in a private grantee such a body of land, marsh and water as "East

Harbor." History is full of instances of the exercise of such power by governments, and instances in which the courts have protected such a grantee against intrusion are not rare.

The ocean with its gulfs and bays belongs to no nation. Jurisdiction is allowed to such a distance from shore as the protection of that shore requires. This distance was fixed as a marine league at a time when no gun could force a ball farther. But over inland waters the nations in which they lie may hold both as sovereigns and as proprietors. A proprietor may convey all his rights to a grantee unless forbidden by some law to which he is subject. No one not possessed of some right in the thing granted should be heard in objection. Where the grantor is the government, the thing granted government property held by absolute title, and no use of the thing granted to which the public is entitled is taken away, we see no reason for denying to the grantee ownership of the thing granted. In *Lorman* v. *Benson*, 8 Mich. 32, Judge CAMPBELL, speaking of Detroit river, says: "Applying the principles of the common law to the tideless stream in question, we do not conceive what public interests would be subserved by placing it on the footing of tide-waters, when the rules applying to public fresh-water streams provide amply for every common easement. The right of navigation, to which all others are subservient, is in no way injured or abridged by this holding, and the necessities of wharves, and other conveniences, which could not be made available at all in such a stream as this, unless owned by the riparian proprietor (because not accessible except over his grounds), would be an inducement to modify the common law, were it otherwise, rather than change it as it is now. * * * And we have no difficulty in holding that the plaintiff is entitled to every beneficial use of the property in question which can be exercised with a due regard to the common easement. The cutting of ice is the exercise of a valuable privilege, in securing that which has become stationary on the freehold, and we conceive of no reason which would justify a denial of it."

In *Rice* v. *Ruddiman*, 10 Mich. 139, speaking of Lake Muskegon, the court, after stating that the real question is not whether the outward limits of private ownership in the lake can be defined with precision, say: "But if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the center line of this narrow lake, then I have no hesitation in saying that I think the riparian ownership extends to such center line.

* * * If the water becomes so deep * * * as to render the lands under it incapable of such individual use, the question of ownership beyond where it is available for such purpose becomes as barren as the use itself, and is of no practical importance whatever.

In *Delaplaine* v. *Railway Co.*, 42 Wis. 225, the court say: "The question as to the ownership of the soil under the water is one which each State is at liberty to determine for itself in accordance with its views of local law and public policy, and if it chooses to concede the right of the riparian owner to the center of the stream, it is not for others to raise objections."

In *Barney* v. *Keokuk*, 94 U. S. 338, the court say: "If they (the States) choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

In *Gavitt* v. *Chambers*, 3 Ohio, 497, the court said: "It is, we conceive, vitally essential to the public peace, and to individual security, that there should be distinct and acknowledged legal owners for both the land and water of the country. This seems to have been the principle upon which the common-law doctrine was originally settled; that where a stream was not subject to the ebb and flow of the tide, it should be deemed the property of the owners of the soil bounding upon its banks. The reason upon which this rule is founded applies as strongly in this country as in any other. And no maxim of jurisprudence is of more universal application than that where the reason is the same the law should be the same."

In the cases referred to the courts were dealing with implied grants, resulting from bounding the premises granted by a stream, or other water. What they say applies with additional force when the State owning both the water and the land, by express terms includes within its grant the territory covered by the water.

We think it was competent for Connecticut, with the sanction of the United States, to vest in its private grantee the ownership of East Harbor, subject to the public rights of navigation and fishing. Did the State include East Harbor in its grant?

[Omitting this inquiry.]

Proceeding to render the judgment required by the record, we grant to the plaintiff a decree for such partition and account, and remand the cause to the Common Pleas for execution.

Judgment accordingly.

Railway Company v. Staley.

(41 Ohio St 118.)

Negligence — proximate cause.

The defendant unlawfully obstructed a street by a train of cars. The plaintiff desiring to pass, walked around the rear of the train, entered another street, obstructed by ice placed there by the defendant in clearing its track, which was laid also in that street, fell upon the ice and was injured. There were other available routes to her destination. *Held*, that the injury was the proximate result of the ice.

SUFFICIENTLY reported, 47 Am. Rep. 385, note.

Brill v. Singer Manufacturing Company.

(41 Ohio. St. 127.)

Trade-mark — patent — expiration.

Where a patented machine becomes known to the public by a distinctive name and by its shape, appearance and ornamentation, any one after the expiration of the patent can make and sell it and use the name, and no one can deprive him of that right by incorporating the name into a trade-mark.

ACTION for injunction. The opinion states the case. The plaintiff had judgment below.

Tilden & Hardacre, for plaintiff in error.

King, Thompson & Maxwell, for defendant in error.

Dickman, J. For many years the defendant in error, the Singer Manufacturing Company, a corporation under the laws of the State of New Jersey, has been extensively engaged in the business of making and vending sewing machines in this and in other countries. The machines made by the company have been called and known as "Singer" sewing machines — the term embracing several varieties, which differ among themselves more or less in principle of construction, mode of operation, and results produced. Among those varieties of machines, as known to the trade, are the "Family

Singer," the "Medium Singer," the "Oscillating Shuttle Singer," and others of different designation. They all belong to the same denomination of Singer machines, and were in the main protected by patents covering their distinctive features. The term "Singer," *eo nomine*, has come to be suggestive not merely of the manufacturer, but of sewing machines of a certain mechanism, character or quality, distinct in construction and mode of operation from the "Home," "Grover & Baker," "Wheeler & Wilson," or other machines known to the public. It would not be claimed that the name "Singer" is now associated with any machine for family use, or other work, that is constructed upon a different principle from that governing any of the various Singer machines, so called.

It is urged however that as the machines originally got their names because of the manufacturer, first, I. M. Singer & Co., and latter the Singer Corporation, the defendant in error has acquired an exclusive property in the name — that the name has become a trade name to indicate machines of the company's manufacture, and has been so recognized by the public. And it is further insisted, that there is no mechanical device, combination, or principle of construction common to the Singer machines, to which the name could refer, and thus become as it were, generic in its character, and free to the use of all manufacturers and venders after the expiration of the Singer patents. But granting that there may be several distinct species of the Singer machines, with no peculiar mechanism or principle of action common to them all, yet each species constitutes a distinctive type or class, with certain special characteristics of outward form and internal construction, and bearing the name "Singer" to distinguish it from others of different make and properties. *Singer Manuf'g Co.* v. *Loog*, Lord SELBORNE, L. C., 8 App. Cas.

Descriptive as the name "Singer" is of machines of a really distinctive character in their construction and principle of operation, when the patents protecting them expired, the right to use that name accompanied the right to make and sell the machines. It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee, if after the expiration of his patent, he shall be allowed to virtually perpetuate his monopoly, in a measure, by preventing all others from using the name, which will describe and make known the invention that has become dedicated to the public.

In *Singer Manuf'g Co.* v. *Stanage*, 6 Fed. Rep. 279, it was held, that when a patented article is known in the market by any specific

designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same, under the designation thereof by which it was known to the public. The original patentee or his assignees acquire no right to the exclusive use of such designation as a trade name. Their rights are under the patent, and expire with it. The specific designation falls into the public domain.

In *Singer Manuf'g Co.* v. *Riley*, 11 Fed. Rep. 706, the question arose, whether that company had an exclusive property or trade name in the word "Singer." The language of the court commends itself to the legal judgment. "It is the consideration now due to the public, when the patents have expired, that it shall have the unobstructed benefit of these inventions, and there is not the least foundation in principle or reason, for allowing the patentees to continue to enjoy as much of the monopoly, as they can save by the claim to use exclusively the trade names, by which they identified and secured to themselves the reputation of their inventions. These go along with the invention, as a dedication to the public for purposes of description and identification."

In *Singer Manuf'g Co.* v. *Larson*, 8 Biss. 151, it was held, that if a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because the name expresses only the kind and quality of the machine. Indeed it is an elementary principle, that every one has the right to make and vend any wares not protected by patents, and it is now well settled, that a manufacturer of a patented article, after the patent has expired, has the right to represent that it was made according to the patent, and to use the name of the patentee for that purpose. *Wilcox & Gibbs Sewing Machine Co.* v. *Gibbons Frame*, 17 Fed. Rep. 623.

The original petition in this case alleges, that Brill, the defendant therein, in violation of the rights of the Singer Manufacturing Company, the plaintiff, was then and for some time past had been engaged in selling sewing machines not manufactured by the plaintiff, but having the form, shape, outline, ornamentation and appearance of machines of the plaintiff's manufacture, which he was then selling as "Singer Sewing Machines," and "English Singer Sewing Machines," and under other colorable imitations of the trade name

"Singer." It is further alleged, that the defendant was then advertising such machines by means of cuts and prints which are imitations of plaintiff's cuts and prints, and which are representations of machines of the plaintiff's manufacture, and that the defendant in other ways was then giving out and representing that the sewing machines which he was selling were manufactured by the plaintiff, whereas in truth they were not.

The trade-mark adopted by the Singer Company and placed at the base of the arm of the "New Family Machine," which it manufactures, consists of an oval brass plate, containing in its center the letter "S," and in the center of that a shuttle, needles crossed, and two transverse lines, representing thread. Circling over this, at the top, were the words "Singer Manufacturing Co., N. Y." and below, the words "Trade-Mark," and a circular wreath representing flowers or plants. It is sought by blending the name "Singer" with the trade-mark, to perpetuate an exclusive property in the name after the life of the Singer patents. But a patentee or his assignee, by incorporating into his trade-mark the distinctive name by which a patented machine has become known to the public during the existence of the patent, cannot, after the expiration of the patent, take away from the public the right of using such name. The trade-mark cannot be made a guise for extending the monopoly, or preventing the name from becoming with the patent the property of the public. *Singer Manufacturing Co.* v. *Riley, supra.*

The Singer Manufacturing Company had become the proprietor of, or interested in several patents for improvements upon the machines manufactured and sold by it; but the patents had expired a long time prior to the alleged acts which are subjects of complaint. An injunction, however, coextensive with the prayer in the plaintiff's petition was granted, and the defendant was perpetually enjoined, not only from using the name "Singer," but from selling sewing machines having the external appearance, shape, or ornamentation of the machines of plaintiff's manufacture; and also from using a trade-mark, which imitates the trade-mark used by plaintiff, in size, color, shape and general appearance.

While there may be a similitude in form and finish between the machines made by the defendant in error, and the "English Sewing Machine" sold by Brill, as the general agent of the Williams Manufacturing Company of Montreal, we think there should not have been an injunction granted against that company's introducing

their machines to the public, in the habiliments which they saw fit to adopt. Where machines during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind, manufactured and sold by them. It is not claimed that the shape, ornamentation or external appearance of the machines made by the Singer Manufacturing Company were protected by any patent for a design, nor could these insignia find protection under any of the Singer patents which had expired. Of the patents which the Singer Manufacturing Company owned or became interested in, and of the external appearance, shape or ornamentation of its machines, it may be said, as was said by the court in *Fairbanks* v. *Jacobus*, 14 Blatchf. 337, "Their patents, while they existed, protected them in the essential structure of their invention, but the exterior form, painted color, and such non-essentials were not, and could not be, the subject of the patents, and the patents did not, and could not secure these to the plaintiff. Much less could these be secured as a trade-mark, for a trade-mark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates. An invention of structure a patent for the invention secures; a design is secured by a patent for that. Apart from these any one may make any thing in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." At common law the form, ornamentation or external appearance of the machines would be open to all as modes of designation or identification. In the case at bar, they are accompaniments which serve to identify machines of a certain kind and quality, without reference to the manufacturer; and when the patents covering the machines expired, they should not, any more than the name "Singer," be made the means of continuing the monopoly under the cover of a *quasi* trade-mark or symbol.

As to the complaint that the agents of the Williams Manufacturing Company have been engaged in selling machines made by that company as and for machines manufactured by the Singer Manufacturing Company, it is the undoubted right of every man who is

known to the public as the favorite manufacturer of any article, that another shall not make and vend the same article, and palm it off as the production of the first maker. As said by Lord BLACKBURN in *Singer Manuf'g Co.* v. *Loog, supra,* "the original foundation of the whole law is this, that when one knowing that goods are not made by a particular trader, sells them as and for the goods of that trader, he does that which injures that trader." If he sells wares of as good quality, he impairs the patronage of the trader under a false pretense; and if he sells wares of an inferior quality, he injures the good will and reputation of the trader's business, But upon a review of all the testimony, we have been unable to discover any deception practiced by means of any business card, advertisement, circular or other publication, by which the machines of the Williams Manufacturing Company have been put upon the market as having been manufactured by the Singer Manufacturing Company. On one business card, Brill, the general agent, plainly publishes the "English Singer Sewing Machine" as manufactured in Montreal, Canada; and the factory of the "German Singer Sewing Machine" is, on another card, represented as located at Kaiserslautern, Germany; and Kaiser Brothers are held out as the manufacturers. No purchaser of ordinary intelligence would be likely to be deceived as to the manufacturer, or the place where manufactured. And the word "Singer," though used in their cards, circulars and newspaper advertisements, nowhere appears upon the machines manufactured by the Williams Manufacturing Company.

It is said however that the trade-mark of the Williams Manufacturing Company is such an imitation of that adopted by the Singer Manufacturing Company as to be easily mistaken for it by purchasers. How far the similarity is likely to deceive must be determined, not by the impression made upon a heedless and unobservant buyer, but upon one of at least ordinary intelligence and observation. To entitle a complainant to relief against a colorable imitation of a trade-mark he must clearly show not only a property right in himself, but also that the resemblance between the original and the imitation is such as would mislead persons purchasing with ordinary caution. *Robertson* v. *Berry,* 50 Md. 591; s. c., 33 Am. Rep. 328. We do not think that the trade-mark used by the Williams Manufacturing Company--being an oval metallic plate with a lion's head in bold relief. surrounded by the words "Williams M'f'g. Co., Montreal" and "Trade-Mark," is of a

character that would mislead purchasers of ordinary caution. In *Singer Manuf'g Co.* v. *Riley, supra,* the court in passing upon an alleged violation of the trade-mark of the Singer Manufacturing Company of New Jersey, held that the shuttle device, as a trade-mark, had not been violated by the device used on the Williams machine of Montreal — the alleged imitation not being calculated to deceive a purchaser.

Whatever foundation there may be for an action in damages, we do not think that an injunction was warranted against Brill, the plaintiff in error, by reason of the testimony of witnesses who had purchased machines from his agents, and who were called to prove the verbal representations of such agents, that the sewing machines sold by them were of the Singer Company's manufacture. There is evidence that those agents dealt not alone in the "English Singer Sewing Machine," but in the different varieties of sewing machines known to the trade; but whether they dealt in other machines or not, we find no evidence that the plaintiff in error authorized any false representations, oral or otherwise, to be made by his agents as to who were the manufacturers of the Williams machines.

The judgment of the Superior Court we think should be reversed. The injunction granted against the plaintiff in error should be dissolved, and the action of the Singer Manufacturing Company dismissed.

Judgment accordingly.

Harker v. Smith.

(41 Ohio St. 236.)

Will — provision for accountant.

The testator in his will requested the plaintiff to keep the accounts of his executor and assist in the settlement of the estate, and provided a certain salary for him. *Held*, not a legacy, but a contract, for breach of which an action would lie.

ACTION to recover salary. The will of John Bates provided: "I hereby request and desire William J. Harker, who has attended to my business, keeping my books and accounts, to continue to take charge of and keep the accounts of my estate for my executor and trustees, and in any way he can to assist in the settlement of my estate, so long as his services may be necessary, and

for such services I allow him a salary of fifteen hundred dollars per year. to be paid to him by my executor in monthly installments."

The plaintiff averred in his petition that he took charge of the books of the estate and continued to keep the accounts of the estate until April 18, 1874, when the defendant dismisssed and discharged him.

The defendant for defense alleged that he discharged the plaintiff for the reason that the services of a bookkeeper were no longer necessary to said estate; and also that the plaintiff had failed in divers ways properly to discharge his duties as bookkeeper, and alleged also two other defenses.

There was judgment for the plaintiff. This judgment was reversed by the District Court.

Cowan & Ferris and *Hoadly, Johnson & Colston*, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

McCauley, J. The liability of the executor to the plaintiff in error depends mainly upon the question, whether or not the provisions of item thirteen of the will gives him a conditional legacy.

A conditional legacy is defined to be "a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated." 2 Wms. Ex. 1258; 2 Roper Leg. 283. The effect to be given to item thirteen of the will is to be determined by the manifest purpose of the testator in making the provision, rather than by giving force and consequence to any particular expression used in it. The evident purpose of the testator was not to give anything either directly or upon condition to Harker; but to appoint him to assist the executor and trustee of the will to perform certain duties to the estate at a stated salary. While the testator says, "for such services I allow him a salary of fifteen hundred dollars per year," that expression is used in reference to his services to be performed for the estate. If Harker had refused or become unable from any cause to perform the services, he could not have earned the salary. It was to be paid for the services. It was money to be earned, and if not earned, not to be paid. It is urged that it is a legacy upon condition, the condition being that Harker should

serve the executor in a specified way. Service in a specified way is the common way of earning a salary, and the money thus earned as the bookkeeper of the executor belonged to the servant because of the labor he had performed and not because of the provision of the will. The provision that the salary shall be paid in monthly installments indicates that payments shall not be delayed as legacies are, until the indebtedness of the estate is paid; but be paid as the settlement of the estate progressed and as a part of the expenses of managing the estate.

Looking to all the provisions of this item of the will we are of the opinion that it does not provide a legacy for Harker, but is a testamentary appointment of a bookkeeper for the executor, at a a fixed salary, and for such time as a bookkeeper was necessary in the settlement of the estate. The effect of the appointment would be that Harker had the right to the salary, if he tendered performance of the duties of bookkeeper while a bookkeeper was necessary to the executor, even though the executor refused to accept his services; and that after the executor had accepted his services, the same relation as to services and salary and discharge would exist between them as if he had been employed by the executor himself, upon the same terms and conditions specified in this item of the will.

Harker was to be the bookkeeper of the executor in matters pertaining to the estate. And any misconduct, or unfaithfulness or incompetency on his part would justify his discharge the same as if he had been selected and employed by the executor himself. He was acting under the executor and subject to his reasonable control and direction. The executor was charged with the care and management of the estate, and if the bookkeeper thus employed to assist in its affairs, no longer acted in the interest of the estate his discharge by the executors was lawful and proper.

If Harker was wrongfully discharged and could have found employment, or did have employment, whatever he realized or could have realized from it should be deducted from the salary he was prevented from earning by the discharge.

The Superior Court seems to have treated the provision of the will as a provision in the nature of a legacy, and held that Harker was entitled to the monthly allowance if he offered to perform, whether his services were necessary or not and whether they were valuable or not.

The District Court adopted the same view as to the legal effect of the provision of the will, but held further that the Superior Court had not jurisdiction of the action because it was an action against an executor to recover a legacy before the right to recover it had been fixed by a finding of the Probate Court. If the provision however, was not a legacy, as we think it was not, the Superior Court had jurisdiction of it, and in that aspect of the case it becomes necessary to consider some of the proceedings upon the trial to determine whether the court erred in overruling a motion by the defendant for a new trial.

The Superior Court upon the trial instructed the jury "that the defendant by his answer admitting that this provision was made, admitting that the plaintiff entered upon the discharge of his duties and continued to discharge them until the 18th day of April, 1874, avers that he refused any longer to permit him to discharge those duties, first, because it was not necessary to have his services any longer in taking charge of or keeping the accounts of the estate for said executors and trustees named in said will or to have him aid in settling the estate. Second, he says that the plaintiff collected and appropriated moneys of the estate, and kept inaccurate accounts and failed properly to discharge his duties under the provisions of the will; that he became disagreeable and unpleasant in his manner and conduct toward this defendant; and that he also failed to obey the orders given him by this defendant, and that by reason thereof and for the reasons aforesaid he discharged him. Third, he sets forth that the plaintiff entered into a combination with certain persons to defeat the will of John Bates; but as I have already ruled in the course of the trial, that would not authorize the defendant to refuse to permit him to discharge the duties, and you will not consider that portion of the answer." This instruction practically withdraws from the consideration of the jury all matters of defense in an action other than one for the non-payment of a legacy to which the right of the plaintiff was complete beyond all conditions.

The defendant upon the trial requested the court to instruct the jury "that Mr. Smith, the executor, had a right to discharge Mr. Harker or refuse longer to employ and pay him if he refused to obey his lawful orders, if he was negligent and unskillful in keeping the accounts of the estate, if he absented himself improperly from the place of business, the office, and neglected its duties, for improperly retaining or using money of the estate," which request

was refused by the court and and was not given. The refusal to give this instruction prevented the defendant from having proper and pertinent matters of defense considered and was error. The motion of the defendant for a new trial should have been sustained, not for want of jurisdiction as held by the District Court, but for error in overruling the motion of the defendant for a new trial.

Judgment affirmed.

Iron Railroad Company v. Fink.

(41 Ohio St. 321.)

Corporation — suit to compel issue of stock.

An assignee of stock in a railroad company on which an installmen remains unpaid by the original subscriber, may, upon properly tendering the same, with interest, maintain an action in equity to compel the company to issue to him a stock certificate.*

ACTION to compel issue of stock. The opinion states the case. The plaintiff had judgment below.

Neal & Cherrington and *W. A. Hutchins*, for plaintiff in error.

O. F. Moore and *R. Leete*, for defendant in error

Dickman, J. It appears from the record that at the organization of the Iron Railroad Company in the year 1849, Henry Blake subscribed for eighty shares of its capital stock, of the par value of fifty dollars each. Between the 23d of April, 1849, and the 1st of July, 1851, inclusive, sixteen installments of stock, in the aggregate equal to the full amount of his subscription, were called for by the company. At the time of his death, on the 28th of July, 1851, Blake had paid six of these installments as called for, the last being that of March 1, 1850. He had also made a cash payment in addition to paid calls, and his administrator made a further cash payment in July, 1853, leaving an unpaid balance on his original stock subscription.

[Omitting statements.]

On the 25th of February, 1873, the defendant in error, Jacob Fink, as assignee and owner of the eighty shares, tendered to the

* See *Freon* v. *Carriage Co.* (42 Ohio St. 30), 51 Am. Rep. 794.

proper officers of the company the amount of the installments remaining unpaid, with the interest thereon, and demanded the issue to him of stock certificates, which the company refused. Upon such demand and refusal a cause of action accrued to Fink, and suit was thereafter begun on the 31st day of December, 1873.

[Omitting other questions.]

But the question arises had Fink the right to demand the issue to him of certificates for the stock he had purchased from the residuary legatee, and what was his remedy when the company refused to comply with the demand? Though holding no certificates as indicative of legal ownership, he was doubtless the equitable owner of the shares subscribed by Henry Blake. As such owner, seeking not only a transfer to himself of the specific property — the eighty shares — but other equitable relief in reference thereto, it came within the province of a court of equity to extend to him its aid. It is said, however, that courts of equity do not entertain jurisdiction for a specific performance on the sale of stock, where compensation in damages would furnish a complete and adequate remedy. But courts of equity will not refuse to entertain jurisdiction, when in connection with the relief of decreeing a transfer of specific property, a further and essential relief is asked, which those courts, by their procedure, are best adapted to furnish. Fink, as equitable owner, is seeking not only an issue to him of stock certificates, and to be recognized and treated as a stockholder, but he prays for relief by way of account — running through many years — of cash and stock dividends declared, of profits arising in any other manner upon his stock, of the increase and gains of the company since its organization, of the disposition of such increase and gains, and the shape in which they now stand — relief especially equitable in its character, and which he could not adequately obtain through an action at law for the recovery of damages. As far as his remedial rights are concerned, we do not think he should be treated as a delinquent subscriber to stock, and be debarred the privileges of a stockholder, for although neither Henry Blake, nor his administrator, nor James H. Blake ever fully paid the original subscription, Fink, in that regard, is chargeable with no default, his tender of the full amount due on the subscription having been refused by the company.

The practice of courts, in the exercise of chancery powers, to decree the transfer of stock by corporations, is settled by well ad-

judged cases. In *Hill* v. *Rockingham Bank*, 44 N. H. 567, it was held that a bill in equity will lie to compel the delivery of certificates of stock to one who has already an equitable title to such stock, although a suit at law might also be maintained therefor. In *Cashman* v. *Thayer M. Co.*, 76 N. Y. 365; s. c., 32 Am. Rep. 315, which was an action to compel the corporation to transfer upon its books certain shares of stock, and to issue a new certificate, the court say: "The jurisdiction which courts of equity exercise over individuals extends equally to acts done or omitted to be done by private or municipal corporations. And the power to compel a transfer of specific property is a salutary one, and should be exercised where such relief alone will work a complete and ample remedy." The same principle has been recognized in other cases in which courts in the exercise of a sound discretion, have decreed a transfer of stock by corporations, in connection with other equitable relief.

Apart from the foregoing considerations, it will, we think, be suggested by the record that the apparent effort of the plaintiff in error to retain, without accounting, the several sums of money paid to the company by Henry Blake and his administrator, does not forcibly commend itself to the equity and good conscience of the court, when asked to refuse all equitable relief and remand the defendant in error to his action at law for damages.

In our opinion there should be an affirmance of the judgment of the District Court.

Judgment accordingly.

LOESER v. HUMPHREY.

(41 Ohio St. 378.)

Damages — remote — physician's negligence.

Where one has been personally injured by the negligence of another, without fault on his own part, and employs a reputable physician, his recovery of actual damages may not be diminished by the physician's mistake or neglect.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

See note, *White* v. *Conly*, *post*.

J. E. Ingersoll and *Peter Zucher*, for plaintiff in error.

E. J. Blandin, for defendant in error.

DICKMAN, J. The original action was brought in the Court of Common Pleas of Cuyahoga county, by Edward Humphrey against Loeser & Co., for alleged carelessness, in leaving their horse insecurely tied, whereby he broke away and ran with the wagon to which he was harnessed, into the wagon of Humphrey, and severely injured him in his person. At the trial the plaintiff gave testimony tending to prove, that by reason of the collision and accident, the plaintiff had suffered a concussion of the spinal chord and brain, resulting in an injury to his eyesight, which was thereby much impaired; and that in consequence of his injuries, his ability to walk was also much impaired, with other consequential damage. The defendants to maintain the issue on their part, gave testimony tending to prove that the ordinarily approved medical treatment in such cases was to administer currents of electricity to the patient and the injured parts, and that if such had been done in the present case, the condition of the plaintiff would have been better than it was; that for want of such treatment his condition was rendered worse, and more likely to be permanent than it would have been had electricity been applied.

There was a verdict and judgment for the plaintiff.

The District Court affirmed the judgment of the Court of Common Pleas, and this proceeding is now prosecuted to reverse the judgment of the District Court.

The only assignments of error which we deem it material to consider are, that the court erred in its charge to the jury, and in refusing to charge the jury as requested by the defendants below. The court charged in reference to the medical treatment of the plaintiff for his injuries, as follows:

"If the plaintiff is entitled to recover any damages, then he is entitled to recover an amount sufficient to compensate him for the injury which he has actually sustained, so far as the damages to him naturally and directly flowed from and were caused by his wounds, bruises, etc., caused by defendant's acts or negligence complained of. After the plaintiff was injured he was bound to use ordinary care and prudence, under all the circumstances, to take care of himself and his wounds; and if he employed a physician

of good standing and reputation, supposing and having reason to think he was such, and who, in fact, was such as it is admitted he was in this case, then, though the physician may not have used all the approved remedies, or that remedy which would have been most suitable in the case, or which a good medical man would have used under the circumstances, and on account of the failure to use such usual or proper remedy, his condition is worse than it would be had it been used; still, plaintiff may recover for his actual damages, if he himself has not been negligent; and such treatment or failure to use such remedy merely, will not prevent him from recovering the full extent of his injuries as aforesaid."

It is contended in behalf of the plaintiffs in error, that the court, in this portion of its charge, interfered with the province of the jury, and withdrew from them the determination of the question whether Humphrey had used ordinary care in providing himself with a physician, and virtually said to them that if Humphrey employed a physician of good standing and reputation, he had thereby exercised ordinary care. Whether the instruction of the court on this point was erroneous or not we deem it unnecessary to inquire, as we do not consider the instruction material, it not having been claimed at the trial, and the record disclosing no evidence that there was any want of ordinary care and prudence on the part of Humphrey in securing proper medical or surgical assistance. As an instruction to the jury in reference to the care which he should have exercised in employing a physician was not therefore material, the judgment will not be reversed on the ground that such instruction was erroneous. *Loundenback* v. *Collins*, 4 Ohio St. 251; *Creed* v. *Com. Bank of Cincinnati*, 11 Ohio, 489; *Wash. Mut. Ins. Co.* v. *Reed*, 20 Ohio, 202, 206, 207; *Kugler* v. *Wiseman*, 20 Ohio, 361; *Walker* v. *Lessee of Devlin*, 3 Ohio St. 605.

It is conceded that at the time Humphrey was injured, no negligence of his own contributed to his injury. His cause of action was then complete, and Loeser & Company became liable for the natural and proximate consequences of the collision occasioned by their negligence. In tracing the boundary between consequences, proximate and remote, it is difficult, as remarked by Professor Parsons, to lay down a definite rule of great practical value or efficacy, in determining for what consequences of an injury a wrong-doer is to be held responsible. 2 Pars. Cont. 457. In *Harrison* v. *Berkley*, 1 Strobh. 548, it was said: "He shall not answer for those which the party

grieved has contributed by his own blamable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented."

There can be no dispute but that Humphrey acted in good faith, showed due diligence, and used reasonable means to effect his cure and restoration. He employed a physician "of good standing and reputation." It was not incumbent upon him to incur the greatest expense, and call in the most eminent physician or surgeon of the highest professional skill, and most infallible judgment, before he could hold the defendants answerable for the condition in which he was left at the end of his medical treatment. Having exercised ordinary care and reasonable judgment in selecting a physician, he was not required, as said by the court, in *Stover* v. *Bluehill*, 51 Me. 439, "to insure, not only the surgeon's professional skill, but also his immunity from accident, mistake or error in judgment," in order to recover of the original wrong-doer, damages arising from no fault on his part, and from causes beyond his power to control.

It seems to be well settled that where one is injured by the negligence of another, if his damage has not been increased by his own subsequent want of ordinary care, he will be entitled to recover of the wrong-doer to the full extent of the damage, although the physician whom he employed omitted to apply the remedy most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been. *Lyons* v. *Erie Ry. Co.*, 57 N. Y. 489; *Tuttle* v. *Farmington*, 58 N. H. 13; *Stover* v. *Bluehill*, *supra*; *Bardwell* v. *Jamaica*, 15 Vt. 438; *Collins* v. *Council Bluffs*, 32 Iowa, 324; s. c., 7 Am. Rep. 200; *Rice* v. *Des Moines*, 40 Iowa 638; *Eastman* v. *Sanborn*, 3 Allen, 594; *Page* v. *Bucksport*, 64 Me. 51; s. c., 18 Am. Rep. 239.

The collision must be treated as the proximate cause of Humphrey's damage. It was this that imposed upon him the necessity of employing a physician, and of being subject to all the contingencies attendant upon the present imperfect state of medical science. In *Insurance Co.* v. *Boon*, 95 U. S. 117, STRONG, J., said: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation" In *Byrne* v. *Wilson*, 15 Ir. C. L. 332, 342, a stage-coach by the negligence of the driver, was precipitated into a dry canal. The lock-keeper thereafter negligently opened the gate of the canal and drowned a passenger. Under Lord CAMPBELL'S act, the Irish Court of Queen's Bench held that the death

of a passenger under such circumstances, in the language of the act, was "caused" by the negligence of the driver. The passenger would not have lost her life but for the subsequent act of letting in the water, which was not the necessary consequence of the previous precipitation by the negligence of the defendant's servant. But in the opinion of the court, the defendant was not relieved from liability for his primary neglect, by showing that but for such subsequent act, the death would not have ensued. And in *Page* v. *Bucksport*, *supra*, the plaintiff was driving over a defective bridge in the defendant town, when without his fault, the horse broke through the bridge and fell. The plaintiff, in trying to extricate the horse, received a blow from the horse's head, and was injured by it. He was at the time exercising ordinary care. It was held, that the defect in the way was the proximate cause of the injury.

The defendants requested the court below to charge the jury that "if the attending physician did not give the plaintiff the ordinary approved treatment, and his case is worse on that account than it would otherwise have been, then to that degree the defendants would not be liable for his said worse condition." The court refused so to instruct the jury, and in so refusing, we think there was no error. If the condition of Humphrey was worse because his physician did not give the ordinarily approved treatment, it cannot be attributed to any want of care and prudence on Humphrey's part in securing medical or surgical aid.

The judgment of the District Court, we are of opinion, should be affirmed.

Judgment accordingly.

Bronson v. Oberlin.

(41 Ohio St. 476.)

Constitutional law — excise.

A statute authorizing villages having colleges and universities within their limits to provide against the sale of intoxicating liquors within such villages is constitutional.

CONVICTION of selling intoxicating liquors. The opinion states the point.

E. G. Johnson and *S. M. Eddy*, for plaintiff.

W. W. Boynton, *I. A. Webster* and *C. A. Metcalf*, for defendant in error.

NASH, J. 1. Does the act of March 29, 1882 (79 Ohio Laws, 59), authorizing incorporated villages having within their limits a college or university to provide against the evils resulting from the sale of intoxicating liquors therein, contravene the limitations imposed by the Constitution upon legislative power?

In considering this question it must be borne in mind that it is well settled that the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority, and a clear incompatibility between the Constitution and the law appear, that the courts will refuse to execute it. *Railroad Co.* v. *Commissioners*, 1 Ohio St. 77; *Goshorn* v. *Purcell*, 11 Ohio St. 641; *Lehman* v. *McBride*, 15 Ohio St. 573.

It is contended that a classification of incorporated villages such as is sought to be made in this act, and the clothing of the council of such villages with powers not possessed by the councils of other villages, are prohibited by the Constitution.

The Revised Statutes divide cities into grades and make provisions for each grade so established. Municipal corporations are divided into three classes — cities, villages and hamlets. Cities are divided into two classes — first and second. Cities of the first class are divided into three grades — first, second and third. Cities of the second class are divided into four grades — first, second, third and fourth. This classification depends upon the number of inhabitants within a city. In *State* v. *Brewster*, 39 Ohio St. 653, it was held that sections 1546–1550 of the Revised Statutes, which make the classification referred to, are authorized by the Constitution. Judge OKEY, in the opinion of the court, says: "The validity of that classification has been repeatedly recognized in this court, and the reasons for adhering to that construction of the Constitution are cogent and satisfactory."

The principle seems to be that a law which relates to certain municipal corporations as a class, and having a like effect upon all within the class is general; but one that relates to a particular municipality of a class is special. Judge OKEY, in the case of *McGill* v. *State*, 34 Ohio St. 228, said: "Under the power to

organize cities and villages (Const., art. 13, § 6), the general assembly is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature." Judge McIlvaine, in the case of *State* v. *Powers*, 38 Ohio St. 54, said that "judicious classification and discrimination between classes will not destroy the uniformity required by the Constitution." In the case of *State* v. *Parsons*, 40 N. J. Law, 123, the principle is well stated, as follows:

"A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law."

The classification must be just and reasonable, and not arbitrary. In the act under consideration the classification is just and reasonable. It groups in a class all incorporated villages in the State having within them a college or university. There are many of these, and they are located in all sections. Large numbers of boys and young men are congregated in them for the purpose of acquiring an education. Many of them are away from home and parental restraints, and at a time when they are acquiring habits which will make them useful men, or will destroy all hopeful prospects for the future. Such villages are small, and do not have the police restraints of the larger cities. They require regulations which are unnecessary in other villages and in larger cities. The value of their property, and their greater value as suitable resorts for the education of youth, depend upon such villages being kept free from the unrestrained traffic in intoxicating liquors. These considerations, and many others which could be enumerated, show the just and substantial character of the classification made in this law, and the wisdom of the general assembly in making it.

It is also claimed that the legislature cannot delegate the power to regulate the sale of intoxicating liquors to the councils of incorporated villages. This is a settled question in Ohio. Several years ago the council of the village of McConnellsville provided by ordinance that it should be unlawful for any person to keep in its midst a house, shop, room, booth, arbor or place where ale, porter or beer is habitually sold or furnished, to be drank in, upon or about the house, shop, room, booth, arbor, cellar or place where so

sold or furnished. This it did under an authority conferred upon municipalities by statute "to regulate, restrain and prohibit ale, beer and porter-houses or shops, and houses and places of notorious or habitual resort for tippling and intemperance." This act was a delegation of power by the general assembly. In *Burckholter* v. *McConnellsville*, 20 Ohio St. 309, the Supreme Court held the ordinance to be valid, and in so doing of necessity concluded that the legislature could confer a power possessed by itself upon municipal corporations.

2. The plaintiff in error was found guilty of violation of the second and fourth sections of the Oberlin ordinance. These sections prohibited the sale or furnishing of any intoxicating liquors whatever, or in any quantity, to any person, except for two purposes — mechanical and medicinal. In making these sections did the council exceed the power conferred by the act of March 29, 1882? Whether the legislature could confer the power to prohibit the sale of intoxicating liquors, or whether the council by ordinance could prohibit with this power conferred, are questions not involved in this case. The question simply is: "What power did this act confer?" We are of the opinion that it did not give authority to prohibit. As expressed in the body of the law it was a power to provide against the evils resulting from the sale of intoxicating liquors. Section 16, article 2 of the Constitution, provides that the subject of a bill pending before the general assembly shall be clearly expressed in its title. In trying to determine what the object of the words of a statute are, we are authorized to look at its title. The title of the law under consideration is "An act authorizing certain incorporated villages to regulate the sale of intoxicating liquors therein." Considering the words of this act, together with its title, we conclude that the power conferred was to regulate the sale of intoxicating liquors, and to provide against evils resulting therefrom, but not to prohibit. We are confirmed in this conclusion by the fact that in previous legislation the word "prohibit" has been used when that was the object sought, and not alone the words "to regulate" and "to provide against evils." It follows that sections 2 and 4 of this ordinance are void.

A part of an ordinance may be void and the remainder valid, but the other sections of this ordinance are not involved in this case, and therefore we express no opinion in regard to them.

Judgment reversed.

BANK v. BUTLER.

(41 Ohio St. 519.)

Bank — agency collection.

The owner of a domestic note left it with a bank for collection, and if not paid, to fix the indorser's liability. It was not paid, and the bank, according to custom, gave it to a notary for protest. *Held*, that the bank was not liable for his neglect.

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below.

Samuel A. Nash, for plaintiff in error.

W. H. C. Ecker and *D. B. Hebard*, for defendant in error.

MARTIN, J. In May, 1876, Butler, the owner of a promissory note payable June 17, 1876, made by one Croninger, who was insolvent, and which was indorsed by a responsible indorser, left it for collection with the First National Bank of Gallipolis. It was dated at Gallipolis and no place of payment was named in it. When he left it he told the president of the bank that he, the president, understood it, and that he should take legal steps to collect it; and he testified that he then supposed the bank officers would do what was necessary to be done in making the collection. It was not paid when due and was handed to a reputable notary residing at Gallipolis for demand and protest. Croninger at that time resided with his family on a farm some three or four miles from Gallipolis. Shortly before and for a long time he had resided in Gallipolis. The notary failed to make demand but protested the note and gave notice. Butler reimbursed the bank the amount of the notary's fee, and sued the indorser who was adjudged released on account of the notary's negligence. The bank had no agreement for compensation as collecting agent, nor any expectation other than the incidental advantage pertaining to such service.

The original action against the bank was brought by Butler in the Common Pleas of Gallia county, counting on the notary's negligence, and alleging that he had placed the note in the bank for collection and had directed it to collect or legally protest the same. On a trial in the Common Pleas, Butler took judgment. A bill of

exceptions was allowed; and the District Court on error affirmed the judgment. To obtain a reversal of that affirmance the case is here.

The only question that need be noticed is whether the notary, under the facts stated, was the agent of the bank or the sub-agent of Butler.

In *Reeves* v. *Bank*, 8 Ohio St. 465, the plaintiffs, Reeves, Stephens & Co., left for collection with the Commercial Bank of Toledo — a branch bank of the State Bank of Ohio — their draft, duly indorsed by them, for $500, on Buckingham & Co., of New York, which was forwarded to the American Exchange Bank of New York, and was paid and credited to the Commercial Bank. The Commercial Bank failed, and its assets, by force of the statute, passed into the custody of the State Bank. When the draft was paid to the American Exchange Bank it had no notice that it was not the property of the Commercial Bank, its apparent owner, which was then apparently solvent. The action was against the State Bank as representative of the Commercial Bank counting on the averment that the Commercial Bank was the sub-agent of the plaintiffs, and that the proceeds of the draft was their money. The essential points ruled were, that the Commercial Bank was responsible to the owners of the draft for the conduct of the New York bank and for the proceeds of the draft immediately on its collection, and that the New York bank was the agent of the Commercial Bank, and not the sub-agent of Reeves, Stephens & Co.

Admissible deductions from the opinion and the authorities quoted and approved are:

1. That the Commercial Bank in taking the draft for collection agreed to collect it. That whilst it impliedly agreed to transmit it to a reliable correspondent, this was simply incidental to the principal object in view.

2. That the acceptance of the draft for collection was *prima facie* evidence that the service was not regarded as gratuitous; and that it was one of many similar transactions yielding an aggregate profit, and therefore evidence of a valuable consideration.

3. That the Commercial Bank was under the responsibility of the general engagement when it necessarily engaged the services of its correspondent at New York; and that its correspondent was of its own selection, and was a mere instrument used by it in carrying out its contract.

4. That a collecting bank is liable not only for a default of its own officers, but also for that of its correspondent in the absence of an agreement, express or implied, with the owner varying such liability.

These rulings and inferences of that well-considered case are to be kept in mind in reaching a conclusion in the present case. The question is one of interpretation of the contract. It has proved to be difficult of solution, and has led to an irreconcilable conflict in the authorities.

The opposite view is to the effect that the collecting bank, though liable for the default of its own officers and common agents, yet when a duty in course of collection is necessarily intrusted to a sub-agent, the risk of negligence rests upon the owner of the paper, in the absence of an agreement for compensation (other than the incidental advantage of the service), indicative of an intent to warrant against loss from negligence of such sub-agent.

In our view of the facts of this case the judgment here must be the same, no matter which doctrine as to the general rule of law should be accepted. And we have endeavored to set forth the principles already adjudicated in this State with sufficient clearness to avoid misunderstanding as to the scope and effect of our decision. All the authorities agree that the general liability, whatever it may be, incurred by a bank in taking for collection commercial paper, foreign or domestic, may be varied by agreement, express or implied, of the parties. In this case it is sought to charge a bank at Gallipolis, to which a note was delivered for collection dated at Gallipolis, and not made payable at any particular place, for the negligence of a resident notary, whereby the liability of a responsible indorser was released.

No complaint whatever is made of the bank or its conduct in the business, except as it may be held to be responsible for the acts of the notary as its assumed agent. And thus, as has been stated, the only question is whether the notary was the agent of the bank or the sub-agent of Butler.

In this State the office of notary public is established by statute (Rev. Stat., § 110 *et seq.*). Careful provision is made for the appointment of the officer. He receives a commission, and is required to give bond and take an official oath. He is also required to have an official seal, and keep a register which is declared a public record, with provision for its perpetual preservation. One of his duties is "to receive, make and record notarial protests," and

his instruments of protest are declared *prima facie* evidence of the facts therein certified. All bankers, cashiers, tellers or clerks of banks are disqualified to hold the office; and directors, stockholders, attorneys, agents and all other persons holding official relations to any bank are incompetent to act as notary in instances where such bank is interested. The policy of the act is to secure competent and disinterested service, and to encourage the employment of a notary as an independent officer free from bias. But the statute does not require a protest. It renders it inconvenient to dispense with the services of a notary, and as an inducement to employ him as well as for convenience, makes his act *prima facie* evidence of demand and notice. In his petition Butler avers that he directed the bank to collect the note or legally protest it. He had the right to dictate the mode of fixing the indorser's liability or of waiving the performance of that duty altogether. Strictly taken this direction divested the bank of discretion to select a private agent, and made the notary his own agent. The case however should not now if at all turn on such a construction. It should appear that such was in spirit the direction actually given or was the natural import in the circumstances stated of the delivery of the note for collection.

Before the passage of the act referred to a notary frequently sustained a double relation in making a protest, acting both as public officer and as an officer of the bank, or as its agent or attorney under its private employment. But under the statute, bankers throughout the State have generally if not altogether discontinued private employment and relied solely on the notary as an independent officer. We think that under our legislation and in the circumstances stated, a bank's customer in the act of delivering for collection must be held to contemplate the preference given by a protest and to direct the employment in due course of a notary; and that the bank in taking the paper for collection agrees to collect it if paid; and if not paid, to hand it to a reputable notary in season. We think this may be said to be the natural import of the act of delivery by the one and of taking by the other, especially in a jurisdiction where the notary can act only as an independent public officer. Whatever were the duties of the bank they are not involved here. No complaint is made in respect to them.

This case differs widely from the *Reeves* case, *supra*. In that case the customer of course was indifferent as between distant reputable

correspondents. The draft was indorsed to the bank and forwarded and treated as its own, and as pointed out by Judge BRINKERHOFF the consideration for its undertaking was not only the incidental advantage usually arising from the temporary possession of the fund, but also the advantage of having it in Eastern exchange, which to a certain limit it was required by its charter to have, and which at that time commanded a premium.

In *Hoover* v. *Wise*, 91 U. S. 308, the doctrine is very broadly announced that a mere collecting agency is responsible for all agents employed in the course of collection; and that such agency has all the rights and is subject to all the liabilities of an independent contractor; and *Reeves* v. *Bank*, *supra*, is cited and approved on the supposition that it is in point.

In *Britton* v. *Nicolls*, 104 U. S. 757, the defendants were bankers at Natchez, Miss., and received for collection (through a bank in Illinois as agent for transmission only) two promissory notes, both dated at Natchez, with no place of payment named in either. They were handed to a reputable notary for demand and protest. He failed to make demand, but protested the notes and gave notice. The action was to recover for the notary's neglect whereby a responsible indorser was released. The statute of Mississippi relating to notaries was in substance the same as that of this State. Thus that case is on all fours with the one under consideration.

The court held the action not sustainable. Judge FIELD in delivering the opinion of the court thus states the conclusion arrived at: "It is enough here that the notary was not in this matter the agent of the bankers. He was a public officer whose duties were prescribed by law, and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning to whom they might have handed the notes for collection in the conduct of a suit brought upon them." The decision does not purport to subvert the general rule adopted in *Hoover* v. *Wise*, *supra*, and must have been regarded as in harmony with it and as consistent with legal analogies.

In *Gearhart* v. *Boatman's Savings Inst.*, 38 Mo. 60, the sole question was as to the liability of the defendant for the default of

the notary as to giving notice to an indorser of a note which the defendant had received for collection. It appeared that the defendant had appointed the notary and required him to give bond for the due performance of his duties. At that time there had been no authoritative adjudication in Missouri as to the general rule of law on the subject. The action was sustained. The opinion, without announcing a general rule, concludes thus: "The defendant having appointed the notary by the year and required a bond for the faithful performance of his duties made him its agent and an officer of the bank. * * * The notary in this instance was not acting in the character of an independent officer in discharge or execution of a duty devolved upon him by law, but as the agent of the defendant."

Judgment reversed.

Hillard v. New York and Cleveland Gas Coal Company.

(41 Ohio St. 663.)

Landlord and tenant — destruction of premises.

The lessee of a room in a block covenanted to keep the premises in good repair, but if the premises were destroyed, the lease was to become void. A building was thereafter erected on an adjoining lot by third persons, whereby the demised premises were, to a great extent, cut off from light and ventilation, and rendered damp and unhealthy, but were capable of being made tenantable by repairs. *Held*, that the lessee was not authorized to abandon the lease and refuse payment of rent, either under the contract, or under a statute providing that where leased buildings shall be destroyed, or be so injured by the elements or any other cause, as to be unfit for occupancy, the liability for rent shall cease.

ACTION for rent. The head-note states the case. The plaintiff had judgment at trial, which the District Court reversed.

Henderson, Kline & Tolles, for plaintiffs in error.

Marvin, Laird & Norton, for defendant in error.

DICKMAN, J. If the demised premises had been destroyed during the term of the lease, the lessee — the Gas Coal Company — would doubtless have been discharged from the payment of rent. It was one of the covenants in the lease itself, that it should become void

and determine, and all rent thereon should cease in the event of a destruction of the premises. And independently of the written contract between the parties, as only two rooms in the building passed to the lessee, and no interest in the land, the subject of the demise would have been extinguished by the destruction of the building, and the liability to pay rent would thereby have terminated. There would have remained nothing upon which the demise could operate. *Winton* v. *Cornish*, 5 Ohio, 477; *Womak* v. *McQuarry*, 28 Ind. 103; *Kerr* v. *Merchants' Exchange Co.*, 3 Ed. Ch. 315; *Graves* v. *Berdan*, 26 N. Y. 498.

In the case at bar, although the demised premises were not destroyed, it is contended that they were so injured as to become unfit for occupancy, and that therefore there was no longer any obligation to pay rent to the lessors. There was no covenant by the lessors to repair, but the lessee covenanted to keep the premises in good and constant repair at its own expense, and at the expiration of the term, to surrender them to the lessors in as good condition as the same were at the commencement of the lease, the natural decay and wear and loss by fire only excepted. It is to be presumed that the parties made their contract in contemplation of the ordinary action of the elements, and of the situation and condition of the demised premises as patent to the ordinary observer. It would naturally be expected that a building might be erected at any time upon the adjoining vacant lot, fronting on a prominent business street, and thus cut off light and ventilation from that side. But obvious as the contingency was, the lessee did not see fit to make provision for an abatement of rent or termination of the lease, in case the owner of the vacant lot should construct a building thereon. The exclusion of light and air must have been foreseen as not improbable, and the lessee covenanted to pay rent, in full view of the existing and prospective state of things. Having thus covenanted to pay rent, except only in the event of the destruction of the premises, the lessee was bound by its agreement, notwithstanding the subsequent change in the condition of the leased premises by the erection of the adjoining building. *Linn* v. *Ross*, 10 Ohio, 412. It was well said by the court in *Brown* v. *Curran*, 53 How. Pr. 303: "Building is not necessarily a cause of damage to an adjoining owner. And tenants themselves should take notice and be prepared for such contingencies of constant occurrence, and make their arrangements accordingly."

If the lessors had conveyed to the lessee a right to the unobstructed enjoyment of light and air over the vacant lot, for and during its term, they would have been answerable for that right in case of disturbance. But there was no such grant. And the vacant lot not belonging to the lessors at the time of leasing, it cannot be urged with any force of reason, that an easement by implication in the passage of light and air followed a demise of the premises to the lessee. It is true, as said by Judge STORY, in *U. S.* v. *Appleton*, 1 Sumner, 492, that "the general rule of law is, that when a house or store is conveyed by the owner thereof, every thing then belonging to, and in use for the house or store, as an incident or appurtenance, passes by the grant." But it was never incident or appurtenant to the lessors' building, that the adjoining lot should always remain vacant, for the purpose of furnishing light and ventilation to the lessors' tenants.

There is no evidence that the lessors, at the time of the demise, had any more knowledge than the lessee, of the intention of the owner of the adjoining land to put a building thereon. It is not claimed that there was ever any act amounting to an eviction on the part of the lessors; nor are they chargeable with any wrongful act which precluded the tenant from the beneficial enjoyment of the leasehold. As a matter of fact, the leased apartments, instead of being rendered permanently unfit for occupancy by the proximity of the walls of the adjoining building, were made tenantable by repairs, and were occupied by other tenants after their abandonment by the lessee.

Among numerous adjudged cases in the same class with the case at bar, it was held in *Johnson* v. *Oppenheim*, 55 N. Y. 280, that the mere building upon or other improvement of the adjoining lot, by which the demised premises were rendered less commodious of occupation or less suitable to the use of the tenant, did not affect the right of the landlord to his rent, or authorize the tenant to terminate the lease and abandon the premises. And in *Hazlett* v. *Powell*, 30 Penn. St. 293, it was held, that where a lessor demised a building in which were sundry windows opening on the ground of an adjoining owner, the erection of a party wall by such adjoining owner, by which the windows were closed up, is not an eviction by the lessor, nor any defense to the payment of the accruing rent. See also *Palmer* v. *Wetmore*, 2 Sandf. 316; *Myers* v. *Gemmel*, 10 Barb. 537.

It is contended however in behalf of the defendant in error, that the lessee was released from liability to pay rent, and was authorized to surrender the possession of the premises, by virtue of the act of March 30, 1868 (65 Ohio Laws, 35). That act, which is the same as section 4113 of the Revised Statutes, reads as follows:

"That the lessee of any building which shall, without any fault or neglect on his part, be destroyed, or be so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessee shall thereupon surrender possession of the premises so leased." The act is substantially a transcript of the New York statute *in pari materia*, and the adjudged cases in that State serve as reliable aids in its interpretation. Without determining whether the Gas Coal Company, as lessee of only two rooms instead of the entire building, would come within the classification of persons entitled to the benefit of the statute, we are of opinion that the lessee was not injured to the extent, nor was its injury of the kind contemplated by the statute. The evident design of the act was to relieve the ignorant and inadvertent who might fail to protect themselves by special provision in their lease against the evil and mischief of the common law, which held the tenant liable for rent although the demised premises were destroyed by fire, flood, tempest or otherwise, unless he was exempt from liability by some express covenant in his lease. The destruction or injury within the purview of the statute is not that gradual decay which results from the ordinary action of the elements nor injury resulting from the ordinary action of human agencies, which a lessee is supposed to have in view when he enters into his contract. The statute is designed rather to protect the lessee against an unexpected and unusual action of the elements or of human forces, causing a total destruction of the demised premises or an injury thereto only short of a total destruction, which the parties ignorantly or inadvertently failed to anticipate and provide against when the demise was made. In construing the New York statute, the court, in *Suydam* v. *Jackson*, 54 N. Y. 450, say: "The statute provides for two alternatives, when the premises are 'destroyed' or 'injured.' The first alternative, evidently, has reference to a sudden and total destruction by the elements, acting with unusual power, or by human agency. The latter has reference to a case of injury to the premises.

short of a total destruction, occasioned in the same way. If the legislature had intended to provide that the tenant should cease to be liable for rent when the premises from any cause became so damaged or out of repair as to be untenable, it would have been easy to have expressed the intent in apt and proper language." The alleged damage to the apartments leased to the defendant in error was such as might have been expected to result naturally and ordinarily from the construction of the building upon the adjoining vacant lot. And the structure itself must have been anticipated as one of the probabilities of the future. Its walls necessarily excluded light and air, and caused more or less dampness in the lessee's apartments, but the consequential damage was not the same as that contemplated by the statute under consideration.

The judgment of the District Court we think should be reversed, and that of the Court of Common Pleas affirmed.

Judgment accordingly.

ENGLE v. SOHN.

(41 Ohio St. 691.)

Statute — "manufacturer."

A pork packer is a "manufacturer." (*See note, p.* 107.)

PETITION to enjoin tax. The opinion states the case. The petition was granted below.

John F. Neilan and *Thomas Milliken*, for plaintiff in error.

Slayback & Shaffer, for defendants in error.

DICKMAN, J. During the years 1879 and 1880, John W. Sohn & Co. were a firm engaged in the business of purchasing and slaughtering hogs and packing pork in the city of Hamilton, Butler county. They bought and slaughtered hogs, and subjected the same to certain processes and combination with other materials, requiring the application of skill, labor and capital, and converted them into lard and cured meats, for the purpose of adding to the value thereof, with the view of making gain or profit. It required about forty men to carry on the business, which was conducted under

several departments, each requiring the supervision of a foreman possessed of skill and experience. In rendering lard, curing sides and shoulders, curing, smoking and canvasing hams and packing pork, it became necessary to use other raw materials of various kinds such as salt, saltpetre, saleratus, sugar, molasses, flour, chrome yellow, linseed oil, canvas, wood, paper, barrels, tierces and kegs, and also to use various tools, implements and mechanical devices. The process of curing hams required about three months. They were then ready for smoking, which occupied from six to eight days, when they were wrapped, canvased and dipped in a mixture, to render them air-tight and proof against atmospheric influences and insects. The different branches of the business were carried on together in one building. Sohn & Co. cured all their own meats, and did not deal in meats cured by others. In former years, those that slaughtered were not in the packing business, and packers did not slaughter; but for several years the two branches of business had been as now combined.

In listing their property for taxation for the year ending on the day preceding the second Monday of April, 1880, Sohn & Co. took the greatest value of raw material which they had on hand on any day on each month of the next preceding year, and adding those sums together and dividing the aggregate by twelve listed the quotient $5,130, as their average stock of manufactures for that year — such raw material being articles purchased, received or otherwise held, for the purpose of being used in their packing business. At the time of listing they did not have on hand any articles which had been by them manufactured or changed in any way, either by combination or adding thereto, one year or more previous to such listing. Subsequently to making their return to the assessor, the special board of equalization of the city of Hamilton added to the return the sum of $16,067.90, as an addition "to the monthly average value of pork on hand from time to time during the year," thus treating the article as personal property, purchased in its then existing shape, with a view of being sold at an advanced price or profit, and thereby compelling Sohn & Co. to list as merchants. Sohn & Co. filed their petition in the Court of Common Pleas of Butler county, against the county treasurer, to enjoin the collection of taxes upon such addition to their return, on the ground that they should be taxed as manufacturers, and not as merchants; and a perpetual injunction was thereupon granted. On appeal by the

county treasurer the District Court rendered a like decree as in the court below, and this proceeding is prosecuted to reverse the judgment of the District Court.

The question for our consideration is, whether upon the facts in the case at bar, the defendants in error were taxable as merchants or manufacturers. If taxable as manufacturers only, they were required to return for taxation, as they did, the monthly average value of the raw material which they had on hand during the preceding year, in the same condition in which it was purchased, received or otherwise held for the purpose of being used by them in their manufacturing business. But they were not required to list for taxation such material in a manufactured or partly manufactured state, unless manufactured one year or more previous thereto, as it was not the intention of the legislature to tax the labor, skill and capital, which, when in combination with the raw material, produced the manufactured article. *Sebastian* v. *Ohio Candle Co.*, 27 Ohio St. 459.

The question therefore recurs, were Sohn & Co., for purposes of taxation, merchants under section 2740, or manufacturers under section 2742 of the Revised Statutes? By "section 2740, every person who shall own or have in his possession, or subject to his control, any personal property within this State, with authority to sell the same, which shall have been purchased either in or out of this State, with a view to being sold at an advanced price or profit, or which shall have been consigned to him from any place out of this State, for the purpose of being sold at any place within this State, shall be held to be a merchant."

And under "section 2742, every person who shall purchase, receive or hold personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer."

In both definitions there is the common element of purchasing personal property with a view of making a gain or profit. But the definition of a manufacturer contemplates the attainment of such object by adding to the value of the property after purchase, by some process or combination with other materials, while the merchant is supposed to get his advanced price or profit by selling the article as it is, without subjecting it to any change by hand, by

machinery, or by art. The material entering into the manufactured article may be modified more or less in its identity, as it passes through the several stages of a manufacturing process; but the merchant deals in the manufactured article itself, or its constituents, by buying and selling them in the same condition in which he purchases them. His business is that of exchanges, and not of making or fabricating from raw materials.

The occupation of the defendants in error was we think essentially that of manufacturers. By the use of tools, implements and mechanical devices; by subjecting the slaughtered animals to divers processes, running — some of them — through several months; by a combination with various materials and ingredients requiring skill, care and attention, products were obtained in the form of pork, lard and cured meats, to which may appropriately be applied the term "manufactured articles." The original substance, though not destroyed, was so transformed through art and labor that without previous knowledge it could not have been recognized in the new shape it assumed, or in the new uses to which it was applied. One who produces such results may as correctly be designated a manufacturer as he who buys lumber and planes, tongues, grooves, or otherwise dresses the same, or as he who by a simple process makes sheets of batting from cotton; or as he who buys fruit and preserves the same by canning — all of whom have been held to be manufacturers, and taxed as such under the internal revenue laws of the United States. 9 Int. Rev. Rec. 193; 5 Int. Rev. Rec. 180; Int. Rev. Dec. 117, No. 171. As to the article of ice, to which reference has been made in argument, he is not inappropriately termed a manufacturer who produces artificial ice by the method of vaporization and expansion. The dressed lumber, cotton batting, canned fruits, and artificial ice, though but slightly changed from the original material, could not we think be properly classified as unmanufactured goods. Indeed the term "manufacture" has been extended to include every object upon which art or skill can be exercised, so as to afford products fabricated by the hand of man, or by the labor which he directs. Curtis Pat., § 74.

During the past forty years the business of slaughtering and meat packing from a small beginning has grown to such magnitude that it is now ranked as one of the great industries of the country. It is placed in our Federal census among the mechanical and manufacturing industries of our large cities. In its different depart-

ments the aid of science and art, and inventive talent has been invoked, and new and improved methods have been devised for facilitating and perfecting its various processes. "The perfection of manufacturing," it has been said, "consists in the being able to effect the wished-for changes in the raw material with the least expenditure of labor or at the least cost." With such a test alone there would be no hesitation in ranking this industry, in its present advanced state, among our most effective branches of manufacture.

These views it may be urged are in conflict with the decision of the court in *Jackson* v. *State*, 15 Ohio, 652. The facts in that case appear to be meagerly reported. The appellant, who was a citizen of the State of Pennsylvania, "engaged in the business of purchasing, slaughtering and packing pork for transportation and sale," at Columbus, Ohio. HITCHCOCK, J., was "not prepared to say," that a person so engaged was a manufacturer within the meaning of the statute. We are however satisfied that if the facts had been the same as in the case at bar, if there had been in the year 1846 the same perfection in the art of packing and curing meats which has since been reached and now exists, Jackson would have been held to be a manufacturer and not a merchant.

The conclusion to which we have arrived is, that Sohn & Company were manufacturers; that as such, they made proper return to the assessor of the personal property of the firm subject to taxation; that the addition to their return by the board of equalization was illegal, and that the District Court did not err in rendering judgment that the county treasurer be perpetually enjoined from collecting any tax upon the addition so made by that board.

Judgment affirmed.

NOTE BY THE REPORTER. — *See note* 40 Am. Rep. 446. In *Evening Journal Association* v. *State Board of Assessors*, 47 N. J. Law, 36, it was held that a company printing and publishing a newspaper is not a "manufacturer," but one doing the business of job printing, engraving, electrotyping, etc., is a "manufacturer." The court said: "Lexicographers define 'manufacture' to be 'the process of making any thing by art, or reducing materials into a form fit for use, by the hand or by machinery.' Worcester's Dict., tit. 'manufacture.' Mr. Brande defines 'manufacture' as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles, in the view of rendering them capable of satisfying some want or desire of man; and manufacturing industry to consist in the application of art, science or labor to bring about certain changes or modifications of already existing materials. He includes under the term 'manufacture' all

branches of industry with the exceptions of fishing, hunting, mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied only to those departments of industry in which the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products. Brande's Encyclopædia, tit. 'Manufacture.' The etymological or scientific meaning of words is useful in the construction of statutes, and sometimes is decisive. An aqueduct company is not a manufacturing company. *Dudley* v. *Jamaica Pond Aqueduct Co.*, 100 Mass. 138. Nor is a mining company. *Byers* v. *Franklin Coal Co.*, 106 Mass. 131. The reason for this distinction is apparent. Illuminating gas is an artificial and not a natural product, produced by the modification of natural substances by art and industry. A company engaged in producing gas is a manufacturing company in its strictest sense. A water company or a mining company manufactures nothing. Such a company applies labor and machinery simply in obtaining and making merchandise of natural products without any change of substance. Its business has none of the qualities of a manufacturing business. But the technical or scientific meaning of words does not always control in the construction of statutes. The cardinal rule in the construction of legislative acts is that words in common use are to be taken in their ordinary signification. In *Parker* v. *Great Western R. Co.*, 6 E. & B. 77, the charter of a railway company which authorized the company to charge a certain rate 'for all cotton and other wools, drugs and manufactured articles,' was under consideration. The court held that the term 'manufactured articles' must be understood in its popular sense; that it did not mean all articles produced from the raw state by manual skill and labor, but those articles only which are made in what are, in popular language, called manufactories. To call a farmer, who cultivates his land and reaps and markets his crops, a manufacturer — as he is in the scientific signification of the term — would do violence to language in the construction of a statute, and yet the owner who cuts down the trees which are the growth of his land, and prepares from them lumber for sale in the market, and engages in it as a business is, in a popular sense, and therefore in a legal sense, a manufacturer. Such a person was held to be a manufacturer within the meaning of the Bankrupt Act. *In re Chandler*, 1 Lowell, 478. * * * The Federal court in the Territory of Utah in 1872, decided that the publishers of a daily newspaper, who also conducted in connection therewith a book and job printing office, in which were manufactured cards, notes, bill-heads, blank-books, posters, show-bills, etc., were manufacturers within the meaning of the Bankrupt Act. *In re Kenyon & Fenton*, 6 Nat. Bank. Reg. 238. In a later case, decided in 1877, the Supreme Court of the District of Columbia decided that the publisher of a weekly newspaper was not a manufacturer within the meaning of the Bankrupt Act. *In re Capital Publishing Co.*, 18 Nat. Bank. Reg. 319. In the last

case referred to, *In re Kenyon & Fenton* was cited and commented on. It was there observed that in the earlier case the decision was placed upon the ground that the bankrupts were manufacturers of books, bill-heads, etc., and it was declared that in that respect they were undoubtedly manufacturers within the meaning of the act. This observation was well founded, and all that was necessary to the decision of the territorial court was that the parties were in fact engaged in some business which made their transactions amenable to the bankrupt law. The rest of the opinion was *obiter dictum*, and was disapproved. We agree with the reasoning and with the conclusion of the court in *In re Capital Publishing Co.*, that the publisher of a newspaper is not, in a legal sense, a manufacturer. It is true that in the production of his papers, which he sells, he employs manual labor and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter who executes his painting with his palette and his brush; so does the lawyer who prepares his brief, or the author who writes a book. But neither the sculptor nor the painter is classified as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer, though they employed a printer — the former to print his brief, and the latter his book. In the ordinary and general use of the word 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term. As was said by the court in the case last cited, no definition of the word 'manufacturer' has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. * * * It gives employment to printing presses, types and editors, and yet in the whole history of newspapers from the close of the seventeenth century, this word 'manufacturer' has never been applied to them, or appropriated by them in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or any authority except by way of opinion in the solitary case from Utah.' A newspaper has intrinsically no value above that of the unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to its subscribers arises from the information it contains, and its profit to the publisher is derived, in a great measure, from the advertising patronage it obtains by reason of the circulation of the paper, induced by the enterprise and ability with which it is conducted. Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer." But on the other branch, "both the cases cited from the Federal courts agree that a person engaged in such a business is a manufacturer in a legal sense. And in *Seeley* v. *Gwillim*, 40 Conn. 106, it was held that a person who carried on the business of a book-binder and making blank-books was a manufacturer. In this view we concur. A person who is engaged in such a business would be appropriately denominated a manufacturer in the popular sense of that term, and he would fall within that designation in its scientific sense. for by his skill and labor he adds to the intrinsic value of the materials used, which gives them a merchantable value in the market as merchandise."

Making gas is a "manufacture." *Nassau Gas-light Co.* v. *City of Brooklyn*, 89 N. Y. 409. The court said: "We can see no just reason for interpreting the words 'manufacturing corporations' in any other than their usual and ordinary sense, and as relating to all companies, under whatever law incorporated, and by whatever general name, whose chief and principal business is the manufacture and sale of artificial products. But it is said again that illuminating gas is not such artificial product, but a bounty of nature, imprisoned in coal, and needing only to be set free; and we are asked to take judicial notice of that fact. It has not been proved; it is contradicted by the admission of the plaintiff's certificate describing the character of its business; and also by the express finding of the trial court. To invoke judicial notice against proven facts would make the judge independent of the evidence. But if our general knowledge, not perhaps precisely accurate or scientific, could be properly brought into the discussion, it would harmonize with the facts established without it. Such common understanding is, that the illuminating gas furnished to our streets and dwelling, as furnished and used, is not a mere natural product, but an artificial combination and modification of several. The process is aptly described as a destructive distillation of coal. The illuminating gas of the richer cannel or caking coals, by itself unfit for use because of imperfect combustion, is ordinarily mingled in definite and ascertained proportions with an excess of non-illuminating gas obtained from poorer coal, or other sources of supply, which serves to dilute and thus utilize and carry the light-giving gas. So that the resultant compound differs widely from each of its constituent elements, but even yet needs to be further modified and changed before it is fit for use. Condensation and washing rid it of certain impurities; a chemical process frees it from others; it is finally stored in a holder of ingenious construction; transported through pipes having peculiar appliances; and measured out to the consumer through a meter which is the result of considerable inventive skill, but whose accuracy is not always cheerfully admitted. One at all familiar with the ordinary process which ends in the illuminating as adapted to our use, and with the mechanical devices and operating skill necessary to attain the desired result, cannot be easily convinced that the business of producing it is not properly and accurately described as a manufacture, and the corporation engaged in it as a 'manufacturing corporation.'"

Ice companies are not "manufacturers." *People* v. *Knickerbocker Ice Co.*, 99 N. Y. 181. The court said: "We cannot fail to see that neither it nor its operations are in any way concerned with the manufacture or sale of an artificial product. Its dealing is with 'ice,' as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces, or otherwise. It collects, stores and preserves that which natural causes created, and which other natural causes would destroy and waste. It seeks only to hold these last in check. Similar operations would equally apply to water, fruit, sand, gravel, coal and other natural productions. Water might be improved by filtration, fruit by judicious pruning of the tree or vine, or protection by glass, sand and gravel by screening, cobble-stones by selection, and coal by breaking, and each, by various processes, stored until

the season of demand, when having been 'collected, stored, preserved and prepared for sale,' the natural articles, and no other would be put upon the market. No doubt ice may be manufactured, and frigoric effects produced by artificial means. Corporations exist for that purpose, and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. Its tools and implements are for convenience in handling and marketing a product, and not at all for making it. Many cases are cited by the learned counsel for the appellant, but we find none so comprehensive as to include this case. They all, so far as they have any application, require production of some article, thing or object by skill or labor out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural condition."

In *City of Cambridge* v. *County Commissioners*, the Massachusetts Supreme Court, June, 1883, said: "The cutting of ice produced by the agencies of nature on the surface of a pond into pieces of a size convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture. The material is in no way changed or adapted to any new or different use; it still remains ice to be used simply as ice; it is no more a manufacture than putting of the water from the pond into casks for transportation or use would be a manufacture, or the mining of coal, which has been decided not to be a manufacture. *Byers* v. *Franklin Coal Co.*, 106 Mass. 131."

A saw-mill is not a "manufactory of articles of wood." *Jones* v. *Raines*, 35 La. Ann. 996.

The business of cutting saw-logs and driving them to the place of manufacture is not included within the words, "works, mines, manufactory or other business," etc., in a statute giving a labor lien. In *Pardee's Appeal*, 100 Penn. St. 408, the court said: "The words, 'works, mines, manufactory' thus employed in the act have a definite signification, well understood in their general and popular acceptation. *Ex vi termini* the branches of business intended to be described by them are in a certain sense complete and independent, and of fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. It will scarcely be pretended that either of these words fitly describes the business in which the appellant was employed. It is contended however that the expression 'other business,' etc., is sufficiently comprehensive to embrace cutting and driving logs. Perhaps it would, if we were at liberty to construe it without reference to the context; but the preceding words, designating particular branches of business with which the idea of permanency and completeness, in a certain sense, is always associated, must control the meaning of the more general expression used in immediate connection therewith. The 'other business' is *ejusdem generis* with that more particularly described by the preceding words of the context, business of the same general character, not embracing every species of employment in which the service of others may be rendered.

In *Schott* v. *Harvey*, 105 Penn. St. 222; s. c., 51 Am. Rep. 201, it is said: "The word 'factory' is contraction of manufactory, which Webster defines to be a building or a collection of buildings appropriated to the manufacture of goods. But a manufactory is something more than a building. It

includes not only the building, but the machinery necessary to produce the particular goods manufactured, and the engine and other power requisite to propel such machinery. A building with only bare walls and a roof would no more be a manufactory than it would be a hotel. Such a building would be a mere shell, and would not impose the duty of erecting fire-escapes upon any one."

The builder and repairer of vessels is not a "manufacturer." In *People* v. *N. Y. Floating Dock Co.*, 63 How. Pr. 451; 11 Abb. N. C. 40; affirmed 92 N. Y. 487, the court said: "We understand by a manufacturer one who is engaged in the business of working raw materials into wares suitable for use. Webst. Dict. * * * Undoubtedly, using the words, 'manufacture,' 'manufacturer,' in their broadest sense, the builder and repairer of a vessel, or a house even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the words. * * * The builder and repairer of vessels is a ship carpenter or ship builder; his business is ship carpentry, and he and his business are so styled in common speech, and he is no more a manufacturer, and his business no more manufacturing, than is a house carpenter a manufacturer, or his business manufacturing. In no ordinary and general sense can either a ship carpenter or a house carpenter be said to be 'engaged in the business of working raw materials into wares suitable for use,' and the calling a vessel a ware would certainly strike the average hearer as a strange definition."

A cooper who makes barrels from rough logs and splits is a 'manufacturer." In *City of New Orleans* v. *LeBlanc*, 34 La. Ann. 596, the court said: "Webster defines a manufacturer to be a person engaged in the business of working raw materials into wares suitable for use. The defendants are either dealers or manufacturers. If they are not dealers, they are manufacturers. They may be both. A dealer is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands between the producer and the consumer, and depends for his profit, not upon the labor which he bestows on his commodities, but upon the skill and foresight with which he watches the markets. A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer, because he does not also tan the leather; the tanner is none the less a manufacturer of leather, because he does not breed and raise the bullocks from which the raw hides are taken. The tanner makes leather to sell, but does not buy hides to sell again. He produces the article of the leather and depends for his profit upon the labor which he bestows upon the raw material.

Fire wood is not a "manufactured article." "No more so than grain or wool." *Correio* v. *Lynch*, 65 Cal. 278.

CASES

IN THE

SUPREME COURT

OF

VERMONT.

LANGDON v. BAXTER NATIONAL BANK.

(57 Vt. 1.)

Negotiable instrument — notice of equities.

The guardian of L., an insane person, pledged negotiable bonds belonging to his ward as collateral security for his own debt, representing that they were his own. The bonds however were indorsed with an assignment by a former holder to L. *Held*, that the transferee was put upon inquiry and subject to equities.*

REPLEVIN for bonds. The head-note states the facts. The plaintiff had judgment below.

W. Dunton & Edward Dana, for defendant.

Prout & Walker and *Beman & Platt*, for plaintiff.

POWERS, J. [Minor point omitted.] A *bona fide* purchaser for value of these bonds would take a perfect title to them. This is the rule in all the courts in this country, Federal and State. It is said that the rule in Vermont opens a wider door for inquiry in cases of this kind than is found in other States and in the Federal courts; but it is doubtful whether upon a careful reading any real difference in the rule itself or in its application will be found. In all the holder of negotiable paper purchased under due must be a

* See *Gibson* v. *Hawkins* (69 Ga. 354), 47 Am. Rep. 757.

bona fide holder; and whether he bears that character in the transactions is a question always open to inquiry. This is as far as the Vermont cases have gone; and in other jurisdictions cases have taken the same trend. In all jurisdictions *bona fides* is the basis of protection.

The offer to sell these bonds to the cashier was itself—nothing else appearing—a representation that John H. Langdon was the owner. But something else did appear touching his title. The bonds carried an indorsement upon them tending to show title in W. C. Langdon, which indorsement was seen by the cashier and inquired about in his negotiation with John H. Notice of a fact fatal, if true, to the title of John H. came to the knowledge of the purchaser before he bought the bonds. In legal significance, it stood as if W. C. Langdon had told the cashier that he was the owner. If W. C. had personally given him such notice, and he had bought, he would assume the hazard of a disputed ownership. He could not claim the protection of an innocent purchaser. The notice he had from the indorsement upon the bonds put him upon inquiry. The title of John H. was evidenced by his possession and by his declarations. The title of W. C. was evidenced by the memorandum on one and the assignment upon the other. The title of W. C. might be genuine even if John H. had possession. If a stranger had stood as John H. did having the bonds in his possession and declaring his ownership, it probably would not be held anywhere that the protection accorded to innocent purchasers could be invoked to defeat the rights of the true owner when evidence of his ownership was carried upon the paper itself.

When a purchaser is put upon inquiry his inquiry must be made in a direction likely to lead to knowledge of the facts. If a thief should offer paper for sale which disclosed grounds for inquiry to a purchaser, inquiry of the thief alone would not satisfy the rule. No more can the rule be thus satisfied because the seller is an honest man Here the direction the inquiry should take was plainly indicated by the paper offered for sale; and inquiry followed up in that direction would have resulted in knowledge that W. C. Langdon was the true owner.

Judgment affirmed.

McGinnis v. Cook.

(57 Vt. 86.)

Statute of frauds — sale of land — within year.

The defendant orally agreed with a mortgagor of lands to purchase the mortgage, sell the mortgaged property, satisfy the mortgage, and pay him the balance. *Held*, not within the statute of frauds.

ACTION to recover moneys. The opinion states the case. The plaintiff had judgment below.

Redington & Butler, for defendant.

P. R. Kendell and *Lawrence & Meldon*, for plaintiff.

WALKER, J. The plaintiff is not seeking by this action to enforce a contract for the sale of land or an interest in or concerning land. The action is brought to recover the balance which the plaintiff claims is due to him from defendant for the sale of his house and lot under the defendant's agreement to take up the Verder mortgage resting thereon, sell the land and to pay to the plaintiff the balance above the mortgage debt, and other moneys paid to and for the plaintiff by the defendant.

The defendant by this parol contract did not undertake to purchase the plaintiff's premises. He simply contracted to buy the Verder mortgage and hold it for the plaintiff, make a sale of the land, and to account to the plaintiff for any balance there might be left after paying the mortgage indebtedness and other indebtedness to the defendant and expenses and costs.

Immediately after the making of this agreement, the defendant bought the Verder mortgage, and the plaintiff at the defendant's request executed another mortgage to the defendant of the same premises, and a while after, the defendant foreclosed the mortgages, and the plaintiff allowed the equity of redemption to expire without redemption in reliance upon the defendant's said agreement, which the plaintiff's testimony tended to show the defendant renewed several times, both before and after the foreclosure.

The plaintiff thus suffered the title to become absolute in the defendant for the purpose of the sale and accounting under the agreement. The title thus acquired by the defendant was equiva-

lent to a deed of the premises to the defendant in trust for the purpose of said sale and accounting. The plaintiff fulfilled on his part, and the defendant having acquired title as aforesaid sold the premises, and realized more than was required for the payment of the mortgage indebtedness, other claims and costs and expenses, as to which there was no dispute, and the balance thus remaining in his hands he owed the plaintiff, and he is liable for the same in this action under said agreement, and the parol evidence offered as to the agreement of the parties and their proceedings under it was properly received in evidence by the County Court. It was not an agreement which the statute requires to be in writing.

Again if this agreement be regarded as a contract for the sale of land, which the statute requires to be in writing, the doctrine of the statute of frauds does not apply, for as before stated, this is not an action to enforce the contract, but an action to recover the balance of money remaining in the hands of the defendant, arising from the sale of the house and lot by the defendant, which he agreed by the contract to pay over to the plaintiff.

Such a case is not within the statute of frauds.

This contract was fulfilled on the part of the plaintiff by his allowing the equity of redemption under the decree of foreclosure to expire without redemption; and the title thus became absolute in the defendant, which was under the circumstances in effect giving a deed of the premises to the defendant.

The defendant took possession of the land sold, and conveyed it to a third party, received the pay therefor, deprived the plaintiff of all beneficial use or enjoyment thereof, paid the mortgage debt, costs and expenses to be paid out of the purchase-money, and withheld and neglected to pay over to the plaintiff the balance left in his hands above such disbursements.

The claim now is to recover the balance so withheld and due the plaintiff arising out of the sale under this contract. To establish the plaintiff's right to recover such balance the parol contract beeween the parties is admissible in evidence and it is as valid and binding as if it had been reduced to writing. *Bowen* v. *Bell*, 20 Johns.; *Hodges* v. *Greene*, 28 Vt. 358.

It is claimed also that this parol agreement was a contract not to be performed within a year, and for that reason was within the statute of frauds. This point is not a tenable one. The contract was one capable of being completely performed within one

year. It was not by its terms not to be performed within one year. The contract was to buy the Verder mortgage and hold it for the plaintiff, sell the house and lot for the benefit of the plaintiff, and account for the balance. All this might have been done within one year. No time was fixed in which it was to be done. It was an executory contract, upon the performance of which the defendant might have immediately entered.

Nor does it make it any less a contract which might have been performed within one year because the defendant, instead of taking a deed from the plaintiff, resorted to a foreclosure of the mortgages. He was not by the terms of the agreement required to foreclose the mortgages. But assuming that he was, that does not bring it within the statute of frauds. The mortgages might have been foreclosed, and the time of redemption on motion have been fixed by the Court of Chancery at a period of time within and much less than a year, and the title have become absolute in the defendant under the decree, premises sold, debts and expenses paid. and the balance have been paid over to the plaintiff within a year from the time of making the agreement.

It is also claimed that the parol evidence offered by the plaintiff tended to vary the decree of foreclosure, and was objectionable for that reason. This claim has no foundation. There was no attempt to vary the decree. The decree was conclusive, and the plaintiff's right to recover rested on its conclusiveness. The party to whom the defendant sold the premises rested upon this decree as a link in his chain of title. Neither the plaintiff nor the defendant could safely question the conclusiveness of the decree; and the parol evidence was not offered or used for such purpose.

The defendant's objections to the charge of the court were as to the instructions given to the jury bearing upon this parol agreement as to the sale of the house and lot and as to the effect of the same. We find no error in the charge in respect thereto, the evidence having been properly received by the court.

Judgment affirmed.

Bellows v. Sowles.

(57 Vt. 164.)

Executor and administrator — special promise to answer from his own estate.

The promise of an executor to pay an heir at law money to desist from opposition to the will is on sufficient consideration, and is not within the statute prohibiting an action "upon a special promise of an executor or administrator to answer damages out of his own estate."*

ACTION on contract to recover money. The head-note states the point. The plaintiff had judgment below.

Defendant in person, H. S. Royce and *L. P. Poland,* for defendant.

George A. Ballard, Farrington & Post, Wilson & Hall and *Noble & Smith,* for plaintiff.

Powers, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under the statute of frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities, or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the statute of frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause

* See *Bellows* v. *Sowles* (55 Vt. 391), 45 Am. Rep. 621.

of the statute under which this case falls reads: "No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate."

This special promise referred to is, in short, any actual promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer damages out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the testator's estate, for which the executor promises to pay damages out of his own estate. The statute then was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default or misdoings of another." And so Judge ROYCE, in delivering the opinion of the court in *Harrington* v. *Rich*, 6 Vt. 666, declares these two classes of undertaking to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute — that the undertaking contemplated by it, like that contemplated by the next clause, is in the manner of a guaranty; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In the fourth section of the statute of frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages" as equivalent to pay debts of the decedent. This seems to be the construction given to the statute by Chief Justice Redfield, in his work on Wills, vol. II, p. 290 *et seq.*

The Revised Statutes of New York, vol. II, p. 113, have improved upon the phraseology of the old statute as we have adopted it, by adding, "or to pay the debts of the testator or intestate out of his own estate."

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent and not within the statute. *Temple* v. *Bascom*, 33 Vt. 132; *Cross* v. *Richardson*, 30 Vt. 641; *Lampson* v. *Hobart*, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application it is a principle of law well fortified by authority that where the principal or immediate object of the promisor is not to pay the debt of another, but to subserve some purpose of his own, the promise is original and independent and not within the statute. Brandt Sur. 72; 3 Pars. Cont. 24; Rob. Fr. 232; *Emerson* v. *Slater*, 22 How. 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vermont in which the court seems to blend the two rules just laid down.

PIERPOINT, J., in delivering the opinion of the court in *Cross* v. *Richardson*, *supra*, says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite we think is to be found in the fact that it operates to the advantage of the promisor and places him under a pecuniary obligation to the promisee entirely independent of the original debt.

Apply this rule to this case. Here the main purpose of this promise was not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the executor of that estate whether it was to be divided according to the will or by the law of descent. If the subject-matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject-matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists therefore in this case no sufficient, actual primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it as has been said of the protection afforded to an infant by the law of contracts,

that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it instead of being a prevention of frauds, it would become a powerful instrument of fraud. As in this case, the plaintiff would be deprived of his legal right to contest the will by a party who has reaped all the benefit of the transaction and is shielded from responsibility by a technicality. We do not believe that this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to replead on the usual terms.

Judgment affirmed.

STEVENS v PILLSBURY.

(57 Vt. 205.)

Deed — condition — breach.

B. owned two hotels, in the same village, the Trotter House and the Bliss Hotel, and sold the former to the plaintiff for $4,250, and at the same time for the consideration of $2,500, agreed that the Bliss Hotel should never be used for hotel and boarding-house purposes; and as security, conveyed the Bliss hotel to the plaintiff by warranty deed, conditioned to be void if the restriction was observed. The plaintiff went out of the hotel business, and conveyed his hotel, but not his interest under the conditional deed. B. observing the condition so long as he was owner of the Bliss Hotel, finally sold it in parcels; and the several defendants became the owners. Large improvements had been made. There was a clear breach of the condition; but some of the defendants were innocent, and some not. In a suit for forfeiture, *held*, that equity did not require an enforcement of the conditional deed; but that the plaintiff should recover the $2,500, with interest from the time he demanded the money.

SUIT for forfeiture under conditional deed. The opinion states the case. The defendant had judgment below.

John H. Watson, for plaintiff.

Farnham & Chamberlain, for defendant.

Ross, J. January 1, 1885, the orator purchased and took a deed of the Trotter House property, in Bradford, from Ellis Bliss, for the expressed consideration of $6,750. He paid Bliss that amount. Bliss had for a number of years been keeping a hotel on premises adjoining the Trotter House property, known as the Bliss Hotel property. He had purchased theTrotter House property the March previous for about $3,600, and laid out about $400 in making repairs. As an inducement to the orator to purchase the Trotter House property and pay the price asked, he agreed to close and keep forever closed his own hotel property, for hotel, boarding-house, and livery-stable purposes. The orator would not purchase the Trotter House property unless he should be secured from competition in the hotel and livery business upon the Bliss Hotel property, nor unless he could be effectually secured against such competition by a conveyance of the Bliss Hotel property. On the same day he received the conveyance of the Trotter House property, the orator took from Bliss a conveyance by deed, with the usual covenants of warranty, of the Bliss Hotel property, containing the following condition:

"Yet the condition of this deed is such, that if I, the said Ellis Bliss, my heirs, executors, administrators, and assigns do and shall hereafter keep and hold the above premises free and clear from all the purposes of a hotel, tavern, inn, or boarding-house; also, from all the purposes of livery or livery-stabling, as well the buildings that now are erected thereon, as any and all which shall hereafter be erected thereon, so long as wood grows and water runs, truly and faithfully as to the said Harry B. Stevens, his heirs, executors, administrators and assigns, then and in that case, this deed is to be null and void, otherwise in full force and effect."

From the evidence, which does not much conflict, we find that the orator paid $2,500 for this last conveyance, though the consideration named in the deed is $4,000; and the Bliss Hotel property was then worth $3,000 or more. Bliss observed the condition during the time he owned the property, but within a few years sold it in parcels, which at the time of bringing this bill, were owned by the several defendants. It had been built upon, so that it is agreed it was then worth $12,000. The bill was served May 23, 1872. The orator, in the bill, sets forth the two purchases and conveyances from Bliss, and alleges that there have been breaches of the condition by several of the subsequent grant-

ees or their tenants, and prays that the land and premises be declared forfeited to the orator, and for an accounting for the rents and profits; and "for such other and further relief in the premises as the nature and circumstances of the case may require." Just previously to bringing the bill, the orator in writing notified the defendants of the claimed breaches of the condition and demanded the premises. The defendants, by answer, deny that there have been any breaches of the condition, and aver that if there has been a technical breach thereof the orator should not be allowed to wrest from them the premises, worth many thousand dollars more than when the deed was given. In 1870 the orator had given a similar verbal notice to the then owners of the property, and brought a suit in ejectment for the recovery of the premises. On the case coming on for trial, and upon the statements of the respective attorneys, Judge PECK continued the case, suggesting that from the statement of the defendants' attorney he thought there had been a technical forfeiture of the premises, but that equity would probably grant relief by way of compensation. The defendants not moving to bring a bill, the orator brought this bill and discontinued the ejectment suit. The orator leased the Trotter House property, except the livery-stable, for two years and a half, commencing April 1, 1861, and sold and conveyed them May 6, 1867. The purchaser refused to buy from the orator the rights secured to him by the deed of the Bliss Hotel property. Henry B. Kennedy occupied a portion of the Bliss Hotel property in 1868, 1869 and 1870, and kept more or less boarders during that time. His receipts from this source were about $800. This was a clear breach of the language of the condition. From about 1861 to the time of bringing the ejectment suit a portion of the Bliss Hotel property was occupied by Merrill G. Beard and others for an express office, grocery and eating saloon. They furnished oysters, cooked and raw, pies, cheese, etc., to persons who might call for the same, mostly to people who came to the village to do business from the surrounding country. There were fitted up in one side of the room several stalls where meals of this kind were furnished and eaten. Cooked meats were not furnished to any considerable extent; but quite a business was done by way of feeding teamsters and others who were stopping in the village for a short time. We think this was also a breach of the condition of the deed. It is one of the purposes of a hotel, tavern or inn to furnish meals for

that class of persons. If they obtained a meal of oysters, pie, cake and cheese at the eating saloon it was serving to them one of the purposes of a hotel, tavern or inn. The language of the condition is very comprehensive, and was intended to cover every case which would tend to withdraw custom from the Trotter House. It forbids any use of the Bliss Hotel property which would have such a tendency. A valuable consideration was paid for the conditional deed; and the condition should be fairly and reasonably construed to effectuate the intention of the parties to it, which was to inhibit any use of the Bliss Hotel property which would infringe upon the purposes for which the orator was keeping the Trotter House, one of the most prominent of which was furnishing meals for persons who were temporarily in the village. We do not think that the proof clearly establishes that Bagley C. Currier made such a use of the barn of the Bliss Hotel property as was a breach of the condition. Most of the testimony is reconcilable with a use of the barn for the friends and acquaintances of said Currier to hitch their teams in — such a use as any private person makes of his barn. Nor do we think that the keeping of his sons-in-law and their wives and children by Jonathan H. Robinson, on the premises, was a breach of the condition. These sons-in-law and their wives and children were not boarders in the ordinary meaning of that word, but a part of the family. They contributed, as they felt disposed, to the support of the family, but did not regard themselves, nor did Mr. Robinson and his wife regard them, as boarders. Mr. Williams' occupation of the barn for keeping his own horses, and horses that he was training, was not an infringement of the condition in regard to livery or livery-stabling.

1. But admitting these facts the defendants contend that the orator has no right to recover for any breaches while Witt & Fabyan were keeping the Trotter House, nor since the orator sold in 1867. They contend that the immunity secured by the conditional deed was a privilege or appurtenance of the Trotter House, and passed to the purchaser under his deed although he refused to buy the same. We do not think this contention can be sustained. A privilege or appurtenance to a grant is that which is so connected with and necessary to the thing granted that without it the grant itself would not have full effect according to the maxim, *Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.* Examples are windows, doors, etc., of a building, though temporarily

removed at the time of the conveyance; a right of way over the grantor's land which wholly surrounds the land conveyed; a visible plainly marked way in use in connection with the premises conveyed; or a stream of water running to and supplying the premises conveyed, etc. 1 Wash. R. P. 622, 623.

The inhibition upon the use of the Bliss Hotel property for hotel and livery purposes was not necessary to the reasonable enjoyment of the Trotter House property for such purposes. It was not necessary nor visibly connected with the use of the latter for such purposes. It might make them more valuable but not more so than it would any other premises properly fitted up and suitably located in the village of Bradford. The inhibition was not peculiar or necessary to the use of the Trotter House property for such purposes. Although Bliss owned both premises at the time he conveyed the Trotter House property to the orator, it would not be seriously contended that that conveyance carried with it an inhibition upon the use of the Bliss Hotel property for hotel and livery purposes. If it were a privilege or appurtenance of the Trotter House property it would pass with it upon a conveyance thereof. The conveyance of the Bliss Hotel property was a conditional grant thereof to the orator. Adjacent real estate does not pass as appurtenant to the estate described and granted in the conveyance. Wash. R. P. 623. Moreover the grant, *habendum*, and condition of the deed are to the orator, his heirs, executors, administrators and assigns. Neither principle nor the rules of construction, which are but a formula to ascertain the intention of the parties, will allow the conditional estate created by the deed of the Bliss Hotel property to pass as a privilege or appurtenance to the Trotter House property.

2. The defendants also contend that admitting the breaches of the condition the orator can only recover such damages as he can show that he has personally sustained in the business of hotel and livery-stable keeping by reason thereof. By the deed the orator and Bliss made a breach of the condition of the deed the contingency upon which the grant was to take effect. It is hardly correct to say that a breach of the condition worked a forfeiture of the Bliss Hotel property. Bliss for himself, his heirs, executors, administrators and assigns, by the deed solemnly contracted with the orator, his heirs, etc., that upon a breach of the condition the orator's right to the described premises should become absolute. For this grant to become absolute upon the happening of the contingency named in the con-

dition the orator paid a large consideration. It would effectuate the intention of neither party to the deed to hold that the orator could only recover such damages as he could show that he had suffered by breaches of the condition. It would in effect be making a contract for the parties thereto, rather than enforcing the one they have made. It is a case where the parties to the contract have by a solemn instrument declared what the effect of a breach thereof shall be. They have for themselves determined what the orator, his heirs, etc., shall recover for such breaches. They have thereby liquidated the damages for such breaches. While it is true that forfeitures, as such, are odious, both at law and in equity, and are never declared and enforced in equity, and while there is much learning and many distinctions as to when a sum agreed upon as damages for the breach of a contract by the parties thereto shall be treated as a penalty or security for the payment of the damages occasioned by such breach, and when as liquidated damages, and while the decisions upon the subject may not all be capable of being harmonized, it is now well settled that the intention of the parties, when ascertained, is to control. It is justly held that where the sum named in the obligation as the measure of damages for a breach is unreasonably large; or where it is agreed upon to cover usurious interest; or where it is evidently security for the payment of a smaller sum, the sum named in the obligation will be treated as a penalty. But when neither of the foregoing is apparent from the contract viewed in the light of surrounding circumstances, where the party may elect to do or not do as contracted, and in default to pay a certain sum, and especially where the damages occasioned by the breach are difficult of ascertainment, and the rules for measuring them are uncertain, or of difficult application, it will be held that the damages agreed upon are liquidated. Wood Mayne Dam., chap. 8, pp. 198–213; 2 Sedg. Dam. 209–264; 29 Moak Eng. 206–211; *Williams* v. *Vance*, 30 Am. Rep. 26, and note reviewing cases on this subject.

It has rarely been held that in a contract by which a party has agreed to refrain from exercising a particular trade or profession within a named locality, and agreed upon the sum to be paid if he breaks his agreement, the sum thus agreed upon is other than liquidated damages. In addition to the authorities last cited, see also, *Barry* v. *Harris*, 49 Vt. 392; *Butler* v. *Burleson*, 16 Vt. 176; *Dakin* v. *Williams*, 17 Wend. 447; cases cited in note 3, § 170; Wood Mayne Dam.; *Williams* v. *Dakin*, 22 Wend. 201; *Leary* v. *Laflin*,

101 Mass. 334; *Pierce* v. *Fuller*, 8 Mass. 102; *Cushing* v. *Drew*, 97 Mass 445; *Sainter* v. *Ferguson*, 62 E. C. L. 716; *Galsworthy* v. *Strutt*, 1 Exch. 659.

One of the principal reasons for so holding is, that there is no definite measure for the damages occasioned by the breach of such a contract, and they are very difficult of proof. The case at bar well illustrates the difficulty. There was another hotel in Bradford besides the Trotter House. How could the orator prove that the parties boarded by Kennedy, or fed at Beard's eating saloon, would have been patrons of the Trotter House except for such boarding or such feeding? and if they would have been such patrons, how much would have been the profits? They might have patronized the other hotel or another boarding-house. While it is thus difficult to prove the actual damages sustained by the breaches shown, all the evidence is to the effect that two equally well kept and commodious hotels on the two properties would render both properties valueless as hotels. The profits to be derived from the custom obtainable by each would no more than pay running expenses, while if all of the custom is given to one of them the profits are fairly remunerative. Neither is it reasonable to hold that the orator would pay Bliss $2,500 for his agreement to hold the Bliss Hotel property free from such uses under an agreement expressed or implied, that he was to keep watch for breaches of the agreement, and that an action arose for the recovery of a shilling's profit, for every meal of victuals Bliss thereafter sold to a traveller on the inhibited premises. Besides such holding and such construction would in effect nullify the deed of the Bliss Hotel property. If the orator had not purchased the Trotter House property, and had not in it, nor in any other premises in Bradford, gone into the hotel business, he might lawfully have entered into the contract with Bliss that he did, in regard to the use to which the Bliss Hotel property should thereafter be put, and in regard to the results that should follow the breach of the contract. He might have had various reasons for desiring such inhibition — such as a private residence near by, or land on which he desired to have private residences erected. We think it is quite clear upon authority and principle, that if Bliss himself had, soon after his deed of the Bliss Hotel property, violated the conditions of the deed, it would have been the duty of this court to enforce the deed, or to turn the orator over to an action at law to recover possession of the premises.

3. But since making the deed the Bliss Hotel property has been divided by various conveyances, and has by some of the grantees been greatly improved by the erection of valuable buildings; and several of these grantees have carefully kept and used the premises owned and occupied by them free from the inhibited uses. The orator, too, has sold the Trotter House property, and gone out of the hotel business. Under these circumstances, inasmuch as the orator has come into a court of equity, thereby offering to do equity, we think it would be inequitable not to relieve the owners of those portions of the Bliss Hotel property, who are innocent of any breach of the condition of the deed, from an entire loss of the improvements and enhanced value of the property. But the damages being liquidated between the parties to that deed, only one recovery can be had for a breach of the conditions of the deed. Hence the orator should be, at least, made whole in relieving the defendants from a full enforcement of the deed. We think the orator will be made whole by the payment of the sum he paid for the deed — $2,500 — and interest since he demanded the premises at the time he brought this bill. Although the first breaches were of a much earlier date, and continued to the time of the demand, they were of such a nature that they could be waived, or not insisted upon by the orator. We treat his failure to make a demand earlier an election by him not to insist earlier upon an enforcement of his rights under the deed. Generally in such a case the sum in equity to be recovered to compensate for the non-enforcement of the deed would be the value of the premises with the improvements put on by innocent parties. It would be somewhat difficult to fix upon such value in the present case, and the sum paid by him for the deed with interest under the circumstances fairly compensates the orator, and is very nearly the unimproved value of the premises at the time of the demand. The decree of the Court of Chancery is reversed and the cause remanded with a mandate to render a decree, that to be relieved from the deed of January 1, 1885, the defendants pay to the orator within such time as shall be determined by the Court of Chancery, $2,500, with interest since May 23, 1872, and costs; and on their failure to make payment the defendants to be foreclosed of all equities in said premises.

Reversed and remanded.

Bailey v. Troy and Boston Railroad Company.

(57 Vt. 252.)

Master and servant — contractors — nuisance.

When the plaintiff was driving on a highway his horse became frightened at a steam shovel in use on the defendant's lands near the road, and ran away, and the plaintiff was hurt. The shovel was operated and controlled by an independent contractor, although the defendant contemplated its use when the contract was made. *Held*, that the defendant was not liable.

CASE for personal injuries by negligence. The head-note states the case. The plaintiff had judgment below.

T. Sibley and *J. K. Batchelder*, for defendant.

J. L. Martin and *A. F. Walker*, for plaintiff.

Powers, J. The defendant's evidence tended to show that the steam shovel in use when and by which the plaintiff's injuries were occasioned was operated by Munson, without any control or right of control over it or the manner of its use by the defendant; that Munson was an independent contractor, who supplied the shovel and operated it by his own servants, although it was contemplated by the defendant that it should be used when the contract was made by the defendant with Munson.

Upon this phase of the evidence the defendant insisted, and requested the court to charge, that Munson, if anybody, was solely liable to the plaintiff's damages.

In answer to this request the court charged the jury as follows: "If you find that the defendant made the contract with Munson that he, Munson, should do this work of loading the gravel — and I do not understand that there is any controversy between the parties as to the facts with reference to the contract in this respect — that such a contract did exist, or the terms of it, with relation to the amount to be paid him for doing the work under this contract; and if you also find that this contract was made between Munson and the defendant, with the agreement or understanding between them that a steam shovel should be used in doing this work, that this gravel should be loaded with a steam shovel, then the court

will tell you that the defendant would be liable in the same manner and to the same extent that Munson, who did the work and who put the shovel there and used it, would be liable; that the liability of the defendant in that respect would be the same as the liabilty of the contractor who put the shovel there and did the work, if you find that there is any liability that attaches to them under the rule that I shall give you." The rule given the jury was this: If the shovel, while lying still or in operation, by its appearance or its noise, or the noise of the engine used in operating it, was calculated to frighten horses of ordinary gentleness, the plaintiff should recover.

In other words, the jury was told that the defendant's liability was co-extensive with Munson's if it was part of the agreement or understanding of the parties for doing the work that Munson should use the steam shovel.

If the work contracted to be done was in itself unlawful, or the shovel a nuisance *per se*, the instruction given the jury would be unobjectionable. But the work was lawful, and the shovel was an appliance customarily employed by railroads in work of this kind. It could work injurious results to third persons only by its negligent use. The injury done in this case was not by its frightful appearance. The plaintiff's horse passed by it without difficulty; but after passing it in safety its operation commenced; and in this the plaintiff avers negligence. Was this the negligence of Munson's servants, or the servants of the defendant? The defendant cannot be made liable unless the legal relation of master and servant subsisted between it and the men operating the shovel. The fact that Munson was a contractor and employed these men does not of itself preclude the relationship of master and servant between the defendant and these men.

The inquiry in the case is, who was the principal or master in this work, Munson or the defendant? A master is one who not only prescribes the end, but directs, or at any time may direct, the means and methods of doing the work. If he merely prescribes the end and contracts with another to accomplish the end by such means or methods as such other may in his discretion employ, the latter is as to such means and methods not a servant, but a master; and for negligence therein is alone answerable.

This rule of law is forcibly illustrated by the case of *Rourke* v. *White Moss Colliery Co.*, 2 C. P. Div. 205; s. c., 20 Moak Eng.

469. There the defendants, after partly sinking a shaft in their colliery, agreed with W. to finish the work for them on terms, among others, that defendants should provide engine power and engineers to work the engine. The engine, that had been used by defendants in excavating the shaft was thereupon handed over to W. The same engineer remained in charge of it, and continued in the pay of the defendants as before, but was subject to the orders of W. It was held that the engineer was the servant of W., and not of the defendants; and that W. alone was answerable for his negligence in operating the engine.

Murray v. *Currie*, L. R., 6 C. P. 24, is another recent English case in point. The defendant, a ship-owner, employed a stevedore to unload his vessel. The stevedore employed his own laborers, among whom was Davis, one of defendant's crew, whom the stevedore paid, and over whom he had entire control. The plaintiff was injured by the negligence of Davis; and it was held that defendant was not liable. See also, Wood Mast. and Serv., § 313; *Callahan* v. *R. R. Co.*. 23 Iowa, 562.

The conflict in the cases upon this subject doubtless arises from inattention to the character of the work to be done. If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work.

If however the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case the duty to so conduct one's own business as not to injure another continuously remains with the employer. *Bower* v. *Peate*, 1 Q. B. Div. 321; s. c., 16 Moak Eng. 374.

In this case if the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson, he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel.

Reversed and remanded.

HACKETT v. HEWITT.

(57 Vt. 443.)

Marriage — husband's action for conversion of wife's property.

A husband cannot maintain an action for conversion of his wife's separate property.

TRESPASS and trover. The opinion states the point. The plaintiff had judgment below.

William E. Johnson, for defendant.

S. M. Pingree, for plaintiff.

ROSS, J. The defendant, as a deputy sheriff, on a proper process, regularly attached and sold the property sued for as the property of the plaintiff. The plaintiff now seeks, and by the County Court was allowed, to recover for the property in his own name, on the ground that the property was the sole and separate property of his wife. Under the decisions and law of this State, which are so fully, carefully, and clearly collated, stated, and reviewed in the brief of the defendant's counsel, that they need not be further referred to, we think this was error. The common-law doctrine, that the personal chattels of the wife on marriage vest in the husband, does not apply to such property. The legal status of the sole and separate property of the wife is, that the wife holds it to her own use, free from the rights which the husband by the marriage otherwise would have to it. It is because this property was thus held by the wife, that defendant is unable to attach and hold it as the property of the husband. The common law allowed the husband to recover for the personal chattels of the wife, because by that law they were by virtue of the marriage his property, subject to his sole use, care, and control, and liable to be appropriated in satisfaction of his debts. Doubtless, modern civilization and law have departed somewhat from the common law, in allowing the husband by post-nuptial agreement with the wife or by acquiescence even, to renounce the right which the common law by the marriage conferred upon him, and allow the wife to hold such property to her sole and separate use. We are not aware however that any

common-law decisions can be found that hold that a husband can recover in his own name for personal property owned and held by the wife to her sole and separate use. Under the practice that prevailed under the common law, that question could not well arise. By that law the practice was to vest the title to property so held in a trustee. The marriage gave the husband no power or control over such property. Modern law, and our own statute law, as well as decisions, allow the wife herself to hold the title to property thus held by her. It is repugnant to all the principles of the common law even, to allow a plaintiff in his individual capacity the right to recover against a defendant for property which the defendant lawfully took and held against him in that individual capacity and right.

Generally, at common law, suits in regard to the sole and separate property of the wife were brought in the courts of equity; and the wife joined as co-orator, because interested in the property; and because in that court, such property could be protected against the unlawful encroachments of the husband even. But this court has held that the husband and wife may recover in their joint names, for the benefit of the wife, for such property. If the husband by reason of such recovery, attempted to deprive her of the property she had only to apply to a court of equity for protection against him, until the passage of the recent statute which enables her to sue him at law. The principles of the common law, even when applied to the legal status of such property, with the title vested in the wife, require that the wife in whom the legal title is, and for whose benefit the recovery is had, shall be a party to a suit for its recovery. She is the real party plaintiff to the suit. He is the nominal party; and only a necessary party, because by the coverture she is under his legal protection and guardianship, as it were.

Inasmuch as by the declaration the plaintiff only seeks to recover in the right of the wife, and that discloses no right of recovery in him, it was the duty of the County Court to have rendered judgment for the defendant upon the defendant's motion, notwithstanding the verdict. It is the duty of this court to render such a judgment as the County Court should have rendered on the verdict and motion. The judgment of the County Court is reversed, and judgment rendered for the defendant to recover his costs.

Judgment reversed.

Currier v. Continental Life Insurance Company.

(57 Vt. 496.)

Insurance — life — interest — husband in wife's life.

It is presumed *prima facie* that the husband has an insurable interest in his wife's life. (*See note, p.* 135.)

ACTION on life insurance policy. The opinion states the point. The plaintiff had judgment below.

Charles W. Porter, for defendant.

S. C. Shurtleff, for plaintiff.

Taft, J. 1. After the testimony was closed the defendant moved that a verdict be directed in its favor on the ground that the plaintiff had not proved an insurable interest in the life of his deceased wife, the said Sarah M. Currier. The motion was denied. The defendant insists that the plaintiff had no insurable interest in the life of his wife and that therefore the contract was against public policy and void. This objection would have come with more grace from the defendant at the time it was asked to enter into the contract and before the receipt of nearly $3,000 of the plaintiff's money. As Parker, C. J., said in the leading case of *Lord* v. *Dall*, 12 Mass. 115, where a like objection was made: "Nor can it be easily discerned why the underwriters should make this question after a loss has taken place when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation."

Admitting that the rule as to the interest necessary to support a contract of life insurance is that the interest must be a pecuniary one, we think that where no facts are shown in relation to the wife the presumption is that the husband has an insurable pecuniary interest in her life. He is entitled to her services There are many cases where she is the real support of her husband and family, or as is sometimes said she is the "man of the house." In all ordinary cases the husband has a deep interest in the continued life of the wife. Cases may exist where the husband has no interest whatever in his wife's life. She may be a burden — a hopeless maniac,

or invalid; and such facts may require the application of a different rule. There are none such in this case; and we only hold that the presumption is that the wife is a help-meet and the husband has an interest of a pecuniary nature in her living.

[Minor questions omitted.]

Judgment affirmed.

NOTE BY THE REPORTER.—See *Cont. Life Ins. Co.* v. *Volger*, 89 Ind. 572; s. c., 46 Am. Rep. 185, as to daughter in mother's life; *Rowbach* v. *Piedmont, etc., Ins. Co.*, 85 La. Ann. 283; s. c., 48 Am. Rep. 239, as to son-in-law in mother-in-law; *Singleton* v. *St. Louis Ins. Co.*, 66 Mo. 63; s. c., 27 Am. Rep. 331, as to uncle in nephew; also see *Chisholm* v. *Nat., etc., Life Ins. Co.*, 52 Mo. 213; s. c., 14 Am. Rep. 414; *Reserve Mut. Life Ins. Co.* v. *Kane*, 81 Penn. St. 154; s. c., 22 Am. Rep. 741; *Guardian Mut. Life* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 80. See also *Mut. Life Ins. Co.* v. *Allen*, *post*.

This important subject is admirably and exhaustively treated in an article in 32 Albany Law Journal, pp. 385, 403, by Guy C. H. Corliss, which we subjoin:

Common-law rule as to wager policies.—"Wager policies were void at common law. The various statutory enactments in the several States are only declaratory of what had long been a settled doctrine of the jurisprudence of this country. This was held in *Eadie* v. *Slimmon*, 26 N. Y. 9, 17, and *Reese* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y. 516–526. In the last case the court thus stated the conclusion to which an investigation of the subject had led it: 'My conclusion therefore is that the statute of 14 George III, avoiding wager policies upon lives, was simply declaratory of the common law, and that all of such policies would be void, independently of that act.' There seems to have been some uncertainty as to whether this rule obtained prior to the above act of Parliament; but it is impossible to believe that the English judiciary would ever have incorporated into the jurisprudence of that country any other principle. The anomaly would have been unexampled had the court sustained a life insurance upon a life in which the party procuring the insurance had no interest, and at the same time had held void a similar insurance on property. As the court said in *Reese* v. *Mutual Benefit Life Ins. Co.*, *supra*: 'But policies without interest upon lives are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds.' But such a policy was held valid in *Dalby* v. *India and London Life As. Co.*, 28 Eng. Law & Eq. 312. The considerations of public policy which form the basis of this doctrine have been nowhere better stated than in *Brockway* v. *Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249. The court said: 'It is a general rule of law that no one can procure valid insurance on a life unless he has an interest in that life. I may insure my own life, for I have an interest in it. But an entire stranger to me, one who has no interest in my life, as a creditor or otherwise, cannot take out a valid policy on it. Should he procure such policy the law would condemn it as a mere wager, a bet on my life, a gambling contract; and there could be no recovery thereon. This rule prevails, not in the interest of insurance com-

panies or out of regard for them. The rule has its foundation in good morals and sound public policy. It has been well said of such wager policies that 'if valid they would not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about if possible the event insured against.' The annals of crime furnish more than one instance where murder has been perpetrated by the holders of such policies, that they might reap the fruits of speculative insurance upon the life of their victim. If an entire stranger to me were permitted to take out insurance on my life, his sole interest, you must perceive, would be in my speedy death. The law therefore wisely takes from him the temptation to bring about the event by forbidding such contract. The evils of gambling in such policies are also apparent and great, and therefore the law will not sanction insurance obtained for the purpose of speculating upon the hazard of a life in which the assured has no interest.' The most succinct and at the same time most accurate definition of a wager policy is the one to be found in *Reese* v. *Mutual Benefit Life Ins. Co.*, *supra*, at page 528: 'A policy *obtained* by a party who has no interest in the subject of insurance is a mere wager policy.' The word '*obtained*' is italicised, because, as will be shown subsequently, an insurance on life in favor of one who has no interest in the life insured is not necessarily void as a wager policy, provided the insurance is not *obtained* by the party claiming the money, but voluntarily procured by the person whose life is insured, and made payable to such party.

"Starting then with the admitted principle that a policy of insurance in favor of a person who has no insurable interest in the life insured is generally void, the question naturally arises as to what constitutes an insurable interest within the meaning of this rule. The United States Supreme Court have stated the general rule with admirable precision and clearness in *Warnock* v. *Davis*, 104 U. S. 775: 'It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally however to be such an interest, arising from the relations of the party obtaining the insurance either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an inseparable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and the wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful -- as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the insured; otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore independently of any statute on the subject condemned as being against public policy.' It will be seen from the concluding sentence of this extract from the

opinion that the National Supreme Court considered it as settled law that such contracts were void at common law. It cannot be said that in the present state of the law on the subject every statement of an insurable interest contained in or the general rule laid down in the foregoing opinion has the support of adjudications. But the principle which it is there stated should govern in the determination of the question of an insurable interest is so just and so consistent with the reason on which wager policies are declared to be void that it must ultimately be adopted by every American court. The substance of the opinion may be summed up in the following questions: Has the person by whom the insurance is obtained any pecuniary interest in the life insured? Is he so connected by consanguinity or affinity with the person whose life is insured that it is highly improbable that he would gamble on the uncertainty of such life, and that it is highly improbable that any pecuniary consideration would prompt or tempt him to destroy such life or desire its termination? If either of the foregoing questions can be answered in the affirmative the policy is valid. Perhaps the views of the writer are hardly sustained by the opinion last cited; but they seem to rest on the fundamental principles which underlie all the authorities.

"The next inquiry is what has been settled on the subject of insurable interest by judicial decisions.

"**Wife in husband.** That a wife has an insurable interest in the life of her husband has been decided by every court before which the question has come. *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y. 283; *McKee* v. *Phœnix Ins. Co.*, 28 Mo. 383; *Gambs* v. *Covenant Life Ins. Co.*, 50 Mo. 44; *Equitable Life Ins. Soc.* v. *Patterson*, 41 Ga. 338; *Holbroid* v. *Atlantic Ins. Co.*, 2 Dill. 166; *St. John* v. *American Life Ins. Co.*, 2 Duer, 419; *Brummer* v. *Cohn*, 86 N. Y. 14; *Lord* v. *Dale*, 12 Mass. 115; *Loomis* v. *Eagle Ins. Co.*, 6 Gray, 396; *Conn. Mutual Life Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Warnock* v. *Davis*, 104 U. S. 775; *Fowler* v. *Buttery*, 78 N. Y. 73; s. c., 34 Am. Rep. 507; *Thompson* v. *A. T. Life & Sav. Ins. Co.*, 46 N. Y. 684; *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24.

"**Husband in wife.** A husband has no insurable interest in his wife's life. *Charter Oak Life Ins. Co.* v. *Brant*, 47 Mo. 419; s. c., 4 Am. Rep. 328. But an insurable interest in the life of his wife was held to exist in *Conn. Mutual Life Ins. Co.* v. *Schaefer, supra.* In this last case the court held that the policy being valid in its inception, the subsequent divorce of the parties would not vitiate it. To same effect *Olmstead* v. *Keyes*, 85 N. Y. 601, and Bliss Life Ins., § 30. See also *McKee* v. *Phœnix Ins. Co.*, 28 Mo. 383.

"**Man in betrothed wife.** In *Chisholm* v. *National Capital Life Ins. Co.*, 52 Mo. 213; s. c., 14 Am. Rep. 414, the court went far beyond all precedents and sustained a policy of insurance on the life of a man in favor of his betrothed. This decision however is unquestionably correct on principle.

"**Father in child.** The English law would seem to be opposed to a policy issued on the life of a child in favor of the father. *Halford* v. *Hymer*, 10 B. & C. 725. But the rule is just the reverse in this country. All the cases sustain the insurability of the interest which the father has in the life of his child. *Conn. Mutual Life Ins. Co.*, 94 U. S. 457; *Reserve Life Ins. Co.* v. *Kane*, 81 Penn. St. 154; s. c., 22 Am. Rep. 741; *Williams* v. *Washington Life Ins. Co.*, 31 Iowa, 541; *Mitchell* v. *Union Life Ins. Co.*, 45 Me. 104; *Loomis* v. *Eagle Life & Health*

Ins. Co., 6 Gray, 396; *Hoyt* v. *New York Life Ins. Co.*, 3 Bosw. 440; *Warnock* v. *Davis*, 104 U. S. 775; *Grattan* v. *National Life Ins. Co.*, 15 Hun, 74; May Ins., §§ 102–111; Bliss Life Ins., §§ 20–31.

"In *Grattan* v. *National Life Ins. Co.*, the law of insurable interest is so clear that a brief quotation from the opinion will be of value: 'It seems to be well-settled law that a parent has an insurable interest in the life of his child. The insured need not necessarily have any pecuniary interest in the life of the *cestui que vie*. The contract of life insurance is not one merely of indemnity for a pecuniary loss as in marine and fire policies; it is sufficient to show that the policy is not invalid as a wager policy. If it appear that the relation, whether of consanguinity or affinity, was such between the person whose life was insured and the beneficiary named in the policy as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured, such interest will uphold the policy.'

"**Mother in child.** A mother has been held to have an insurable interest in the life of a child. *Reif* v. *Union Mutual Life Ins. Co.*, 17 Ins. Chron. 13.

"**Child in parent.** In *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180, the court decided that a child has not as such an insurable interest in the life of a parent; that to recover on the policy he must show dependence on the parent, or that some substantial advantage is likely to be derived by the child from the continuance of the parent's life. This case is unsound in principle, and it moreover establishes an inconvenient and uncertain rule. Opposed to it are the dicta of SHAW, Ch. J., in *Loomis* v. *Eagle Life Ins. Co.*, *supra*, and of the United States Supreme Court in *Warnock* v. *Davis*, *supra*, and the case of *Reserve Mutual Life Ins. Co.* v. *Kane*, 81 Penn. St. 154; s. c., 22 Am. Rep. 741.

"**Brother and sister.** — *uncle and nephew.* A brother has no insurable interest in the life of his brother. *Lewis* v. *Phœnix Mutual Life Ins. Co.*, 39 Conn. 100. Neither has an uncle in the life of his nephew. *Singleton* v. *St. Louis Mutual Life Ins. Co.*, 66 Mo. 63; s. c., 27 Am. Rep. 321. Nor nephew in life of uncle. *Mowry* v. *Home Life Ins. Co.*, 9 R. I. 346. But a sister has been held to have an insurable interest in the life of her brother, on whom she is dependent (*Lord* v. *Dale*, 12 Mass. 115); and a married sister in life of brother, on whom she is dependent. *Frances* v. *Etna Life Ins. Co.*, 2 Ins. L. J. 657. The right to recover on the policy in the first case was based, not on the mere relation existing between the parties, but on the fact that the sister had a pecuniary interest in her brother's life because of her dependence on him.

"**Husband and wife.** It is not necessary that there should have been a valid marriage between the person whose life is insured and the beneficiary. It is sufficient if the parties are living together as husband and wife. *Equitable Life Ins. Co.* v. *Paterson*, 41 Ga. 338; s. c., 5 Am. Rep. 335; *Estate of Mueller*, 31 Alb. L. J. 283. In each of these cases it appeared that the husband whose life was insured in favor of the woman with whom he was living as his wife had another wife living at the time the policy was issued; and yet both policies were sustained. In the last case the court said: 'Judged by the reason of the principle, there can be no doubt that Maria Mueller had an insurable

interest in the life of John Mueller, when the policy was taken out for her benefit. She had married him in good faith; had borne him children; had kept his house; had aided him in business and helped him accumulate his estate; and 'he had treated her as his wife; had supported her as such; she had passed in society as such, and was dependent on him for support.' *Equitable Life Ins. Co.* v. *Paterson, supra.* She had therefore, as in fact occupying the relation of wife, a deep interest in the preservation of his life. But she had also an interest as the mother of his children. He was under a natural obligation to maintain them until they could maintain themselves.'

"**Creditor in debtor.** A creditor has an insurable interest in the life of his debtor. *Rawls* v. *American Mutual Life Ins. Co.*, 27 N. Y. 282; *Brockway* v. *Mutual Benefit Ins. Co.*, 9 Fed. Rep. 249; *Dalby* v. *India & London Life Ins. Co.*, 15 C. B. 365; *Olmsted* v. *Keyes*, 85 N. Y. 599; *Ferguson* v. *Massachusetts Mutual Life Ins. Co.*, 32 Hun, 306; *Goodwin* v. *Massachusetts Mutual Life Ins. Co.*, 73 N. Y. 497.

"In *Rawls* v. *American Mutual Life Ins. Co.* the court decided that the plaintiff had an insurable interest in the life of one Fish, although the interest which plaintiff had in the life of Fish as creditor was his interest in a debt due to a firm of which he, the plaintiff, was a member from a partnership of which Fish was a member.

"While it is true that a creditor has an insurable interest in the life of his debtor, that interest is not unlimited. The creditor cannot arbitrarily insure the life of his debtor in any amount irrespective of the amount of the debt. It has been expressly held that he cannot take out a policy largely in excess of his claim. *Fox* v. *Pennsylvania Mutual Life Ins. Co.*, 4 Big. L. & A. Ins. Cas. 458; *Morrell* v. *Trenton Mutual Life Ins. & Fire Ins. Co.*, 10 Cush. 282.

"That he may insure his debtor's life in an amount exceeding his claim is settled by authority and clear upon principle. If he were limited to the actual sum due, he could never obtain indemnity, for the premiums paid would steadily reduce the net amount to be received under the policy and the interest accruing would increase at the same time the amount of his claim. The following case sustains this doctrine. *Goodwin* v. *Mass. Mut. Life Ins. Co.*, 73 N. Y. 480. In this case the amount of the debt was $1,200, and the court sustained a policy of $5,000. The authority however is somewhat weakened by the fact that the insured was the sister of the person whose life was insured. The court seems to have based its conclusion, in part at least, on the ground of the relation existing between the parties. 'Another answer to this point' (that the policy was void as a wager policy) 'is that the insured was a brother and near relative of the plaintiff, allied by the strongest ties of kindred, and that she had a pecuniary interest in his life as creditor. There is sufficient in the evidence to show that he owed her the sum of $1,200, which was outstanding against him and unpaid. Occupying the position referred to she is brought directly within the exception of the statute which prohibits wager policies. The plaintiff had clearly an insurable interest in the life of the insured, and the policy was not within the prohibition of the statute. Nor under the circumstances is there any ground for holding that the recovery should be limited to the amount loaned by the plaintiff to the insured.'

"It is not necessary that the creditor should have held a claim which he could have enforced by legal proceedings.

"In *Rivers* v. *Greggs*, 5 Rich. Eq. 274, the insurance was on the life of an infant debtor. No action could have been maintained on the debt as the claim was not for necessaries; and yet the policy was sustained on the ground that the creditor had an insurable interest in the infant debtor's life. That it is not necessary that the amount of the policy should correspond with the amount of the creditor's claim is exemplified in a class of cases that were decided shortly after the breaking out of the gold fever. Parties in the east advanced sums of money to persons who were anxious to go out to the gold mines but had no capital to procure outfit and pay expenses. Those who advanced the money had an interest in the profits of the business. In every case an insurance on the life of the person to whom the money was advanced and in favor of the party making the advancement was sustained, although the amount of the policy largely exceeded the sum advanced. *Miller* v. *Eagle Life Ins. Co.*, 2 E. D. Smith, 268; *Hoyt* v. *New York Life Ins. Co.*, 3 Bosw. 440; *Morrell* v. *Trenton Life Ins. Co.*, 10 Cush. 282; *Bevin* v. *Conn. Life Ins. Co.*, 23 Conn. 244; *Trenton Mut. Life and Fire Ins. Co.* v. *Johnson*, 4 Zabr. 576.

"In *Bevin* v. *Conn. Life Ins. Co.*, the amount loaned was $300, and the court sustained a policy of $1,000.

"In *Hoyt* v. *New York Life Ins. Co.*, the policy was $1,000, and the sum advanced about $200. The policy was held valid. It is true that in each one of these cases the insured had an interest in the life of the debtor exceeding the amount of the debt, as he was to share in the profits, but that interest was not capable of being accurately or even approximately estimated; and the cases are therefore authorities for the general doctrine, that when the interest of the insured is merely a pecuniary one, it is not necessary that it should be susceptible of a definite valuation, and that the amount of recovery is not limited by the actual pecuniary loss sustained by the death of the debtor. It has been held that a master has an insurable interest in the life of a skilled servant whom he has employed for a certain period. *Hebdow* v. *West*, 3 Best & S. 578.

"**Copartners.**— In *Conn. Mut. Life Ins. Co.* v. *Luchs*, 108 U. S. 498, the court decided that a partner has an insurable interest in the life of his copartner. L. & D. were partners. Each was to furnish one-half of the capital. L. in fact furnished it all, about $10,000. L. took out a policy for $10,000 on life of D. *Held*, valid for the full amount, the court saying: 'Certainly L. had a pecuniary interest in the life of D. on two grounds, because he was his creditor and because he was his partner. The continuance of the partnership and of course a continuance of D.'s life furnished a reasonable expectation of advantage to himself.'

"**Policy payable to one having no interest.**— It is not however always necessary that the person holding the policy should have an insurable interest in the life insured to entitle him to recover on the policy. The doctrine of wager policy seems to apply in only those cases where the insured himself attempts to procure a policy on his motion and without the original solicitation or application of the person whose life is insured. The following rule may now be considered as definitely established in most jurisdictions in this country: that

when the person whose life is insured, voluntarily, without the request or solicitation of the person to whom the policy is made payable, procures an insurance on his own life, and then has the loss made payable even to one having no insurable interest in his life, the policy is valid. *Olmsted* v. *Keyes*, 85 N. Y. 593; *Campbell* v. *New England Mut. Life Ins. Co.*, 98 Mass. 381; *Lemon* v. *Phœnix Mut Life Ins. Co.*, 38 Conn. 294; *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Provident Life Ins. & Ind. Co.* v. *Baum*, 29 Ind. 236; *Fairchild* v. *North Eastern Mut. Life Ass'n*, 51 Vt. 635; *Langdon* v. *Union Mut. Life Ins. Co.*, 22 Am. Law Reg. 385. See also *Guardian Mut. Life Ins. Co.* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180, and *Am. L. & H. Ins. Co.* v. *Robertshaw*, 26 Penn. St. 189.

"In *Campbell* v. *New England Mut. Life Ins. Co.* the policy was made payable to one having no insurable interest in the life insured.

"In *Provident Life Ins. Co.* v. *Barnes* the court said that it was 'beyond question that a person has an insurable interest in his own life, and that he may effect such an insurance and appoint any one to receive the money in case of his death during the existence of such policy.'

"In *Olmsted* v. *Keyes* the court declared: 'It is abundantly settled in this State that one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured.'

"The case of *Langdon* v. *Union Mut. Life Ins. Co.*, in the United States Circuit Court for the eastern district of Michigan, is a very strong authority on this point. The facts were that the defendant issued a policy on the life of one Baker, payable to his brother-in-law, the plaintiff, in case plaintiff should survive Baker; otherwise to be payable to Baker himself. The agent of defendant solicited plaintiff to take out a policy on his own life, but plaintiff refused to do so, but referred the agent to Baker, and states to him that if Baker would take out a policy on his own life he would pay the premiums. The court left the question to the jury whether the policy was taken out in good faith by Baker with a designation of the plaintiff as the person to receive the money, or whether it was intended by plaintiff as a wagering contract. On motion for a new trial, the jury having sustained the policy, the question was held to have been properly submitted to the jury, the court saying: 'The facts however that the policy was taken out by Baker at the plaintiff's instigation, and that the premiums were paid by plaintiffs, taken in connection with Baker's position in life, his total want of means, and the further fact plaintiff had obtained policies upon his life to the amount of $6,000 in addition to this, were strong evidence to show that the transaction was a mere wager upon his life, notwithstanding the fact of Baker's reversionary interest. * * * Under all the circumstances I think the question was properly submitted to the jury.' The case is an extreme one because it appears that Baker took out the policy at the instigation of the plaintiff, and that plaintiff paid all the premiums. Were there no other facts in the case it is quite clear that the court would not have been justified in leaving the question of wager policy to be decided by the jury on a question of fact. But it appeared that the plaintiff's interest in the policy was contingent on his surviving Baker; and the

court on this point said: 'It was thought that the fact that the policy provided in express terms that in case of the previous death of the plaintiff it should revert to the insured, and hence that the plaintiff's interest was contingent upon his surviving Baker was some evidence to go to the jury that the policy was taken in good faith. It was certainly consistent with an understanding that the plaintiff wished to hold the policy during his life as security for the premiums with a resulting trust in favor of Baker's wife, who was his own sister.' It is difficult to see however how this fact can have any effect on the question whether the policy was a wager policy. The plaintiff having no insurable interest in Baker's life could recover only on the ground that Baker himself, without any solicitation on the part of the plaintiff, took out the policy and voluntarily made it payable to plaintiff. The facts were conclusive against this view of the transaction, and there was therefore nothing to submit to the jury. The 'good faith' of the plaintiff was of no importance. If 'good faith' is to be the test in such cases, the question whether a policy is void as a wager policy must in nearly every instance be submitted to a jury, and in practically every case the policy will be sustained, and the rule of law which declares void wager policies will be virtually annulled. In all the other cases on the point the question has been decided by the court as a question of law. The decision is not sustained by a single authority; it is repugnant to the fundamental principles on which the courts have based their decisions sustaining policies in favor of persons who have no insurable interest in the life insured; and it would inevitably lead to the practical abrogation of the common-law rule which declares wager policies to be void.

"The fact that the beneficiary pays the premiums is not conclusive against the policy where he has no interest in the life insured. The policy may nevertheless be valid. *Triston* v. *Hardey*, 14 Beav. 232; *Armstrong* v. *Mut. Life Ins. Co.*, 13 Rep. 711; *Langdon* v. *Union Mut. Life Ins. Co.*, *supra*.

"But where the policy is taken out at the instigation of the beneficiary it is void unless he can show an insurable interest. *Wainwright* v. *Bland*, 1 Mees. & W. 32.

"**Subsequent failure of interest.** Assuming that the beneficiary under a life policy had an insurable interest at the inception of the contract, will a subsequent failure of that insurable interest annul the policy? The decided weight of authority favors the continued validity of the policy, notwithstanding the failure of interest. *Ferguson* v. *Mass. Mut. Life Ins. Co.*, 32 Hun, 306; *Rawls* v. *Am. Life Ins. Co.*, 27 N. Y. 282; *Brockway* v. *Mut. Benefit Ins. Co.*, 9 Fed. Rep. 249; *Dalby* v. *India & London Life Assur. Co.*, 15 C. B. 365; *Olmsted* v. *Keyes*, 85 N. Y. 593–599; Bliss Life Ins., § 30; May Ins., §§ 115, 116; *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457.

"In *Ferguson* v. *Mut. Life Ins. Co.* the creditor's claim had been destroyed by the debtor's discharge in bankruptcy, the court saying: 'Both upon principle and authority we should say that the insurer is bound to fulfill its contract valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom.' In the next three cases it appeared that the creditor's claim was barred by the

statute of limitations, at the time of the death of the debtor, and yet the policies were all sustained.

"In *Rawls* v. *Am. Life Ins. Co.*, the court said: 'But in the contract of life insurance it is enough that the party effecting the insurance had an insurable interest at its inception; and it is not required that that interest should continue and exist at the time of the death of the person whose life is insured to entitle the holder of the policy to recover.'

"In *Olmsted* v. *Keyes*, the court declared 'a creditor may take out a policy on the life of his debtor, and the policy will continue valid, although the creditor has been paid and has thus ceased to have any interest in the life of the insured.' P. 599. Destruction of the beneficiary's interest in the life by death or divorce will not vitiate the policy. This was expressly held as to death in *Olmsted* v. *Keyes*, and as to divorce in *Conn. Mut. Life Ins. Co.* v. *Schaefer*, *supra*. In the first case the court said: 'Death no more destroyed such value than an absolute divorce would, and yet it cannot be doubted that a policy held by a wife upon the life of her husband continues valid, although her interest in his life has ceased in consequence of a divorce.' Bliss Life Ins., § 30.

"In *Sides* v. *Knickerbocker Life Ins. Co.*, 16 Fed. Rep. 650, the Circuit Court held that a tenant of a landlord who had only a life estate had an insurable interest in the landlord's life; that the amount of recovery could not be limited by the value of his leasehold at the time of taking out the policy, but that the tenant could recover the full face of the policy, and that his interest in the policy was not destroyed by the failure of his interest in the life of the landlord because of the termination of the lease.

"In *Conn. Mut. Life Ins. Co.* v. *Schaefer*, *supra*, in which a subsequent divorce was held not to invalidate the policy, the court said: 'We do not hesitate to say however that a policy taken out in good faith and valid at its inception is not avoided by the cessation of insurable interest unless such be the necessary effect of the provisions of the policy itself.'

"**Assignment.**— The remaining question to be considered is as to the validity of an assignment of an insurance policy, legal and binding in its inception, to one having no interest in the life insured. The majority of the cases hold that such an assignment is valid. *Valton* v. *Nat. Fund Life Asso'n*, 20 N. Y. 32; *St. John* v. *Am. Mut. Life Ins. Co.*, 13 N. Y. 31; *Fairchild* v. *Northeastern Mut. Life Ass'n*, 51 Vt. 625; *Clark* v. *Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *Ashley* v. *Ashley*, 3 Sim. 149; *Mut. Life Ins. Co. of New York* v. *Allen* (Mass. S. C.), 30 Alb. L. J. 363; *Olmsted* v. *Keyes*, 85 N. Y. 593; *Cannon* v. *N. W. Mut. Life Ins. Co.*, 29 Hun, 470.

"In *Clark* v. *Allen*, the court, in replying to the argument against sustaining an assignment of a life insurance to one having no interest in the life insured, said: 'But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided too that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though

the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation which is supposed to beset the assignee without interest to bring it to an end.' It must be confessed that the answer of the court is not very satisfactory. It is certainly far from being conclusive. The argument based upon the assignability of a remainder is exceedingly weak. It would be the height of folly to prohibit the transfer of a remainder on the ground that the assignee would be interested in accelerating the death of the life tenant, because the original remainderman himself has precisely the same interest. But the original holder of a life insurance policy must as a rule have no such interest. On the contrary he must have an interest in the continuance of the life. It is thus seen that the cases are entirely dissimilar, and the right to purchase in the one case furnishes no argument for the right to purchase in the other.

"In *Olmsted* v. *Keyes* the court declared 'that if the policy be valid in its inception the party taking it may assign it to any person as he could assign any other chose in action, and that the policy will continue valid in the hands of the assignee, although he has no interest whatever in the life insured.'

"There are several respectable authorities opposed to this doctrine. *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313; *Franklin Life Ins. Co.* v. *Sefton*, 53 Ind. 380; *Missouri Valley Life Ins. Co.* v. *Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 761; *Cammack* v. *Lewis*, 15 Wall. 643; *Warnock* v. *Davis*, 104 U. S. 775.

"The reasoning of the court in *Missouri Valley Life Ins. Co.* v. *Sturges* is very powerful, and demonstrates in the most unanswerable manner the evils and anomaly of the doctrine of assignability to a person who has no insurable interest in the life insured. The court said: 'On May 8, 1872, Haynes assigned said policy to the present plaintiff, Arthur D. Sturges, who had no interest in the life of Haynes. The insurance company assented to said assignment. The plaintiff, Sturges, afterward paid the premiums on said policy. On January 30, 1873, Haynes died, and Sturges then commenced this action to recover the amount of said insurance policy. Can he recover? We think not. Sturges never had any interest in the life of Haynes; but on the contrary his whole interest, after said assignment, was in the death of Haynes. Each year that Haynes lived Sturges was compelled to pay out $150.32 without the slightest hope of ever recovering any thing in return therefor. He was compelled to pay that amount in order to preserve the life of his insurance policy; but no payment that he could make would ever increase the amount of the benefit which he expected finally to receive. The policy in case of death was worth just as much on the day of assignment as it ever could be afterward. If Haynes had died on the very day on which said assignment was made, the holder of the policy would have been entitled to receive just $2,000, and no payment of premiums for any length of time afterward could ever increase that amount. Nor was Haynes bound to ever refund anything to Sturges. * * * Nor was there even the slightest tie of kindred or relationship, or even of friendship, binding them together and making it desirable to Sturges for Haynes to live, and as soon as that event should take place Sturges expected to receive from the insurance company the sum of

$2,000, and of course all his expenditures on said policy and on Haynes' life would then cease. Hence it will be perceived that Sturges, after said assignment, had a vast interest in procuring the death, but had no interest whatever in preserving his life. Haynes' life cost Sturges $150.32 each year without the slightest benefit in return, while Haynes' death would be worth to Sturges $2,000 without the slightest loss of inconvenience whatever. Now can such a state of things be tolerated by the laws of any civilized country? * * * If any person should desire to know what men may do when they are strongly interested in procuring the death of another person for the purpose of obtaining the benefit of a life insurance policy, he may read the case of *State* v. *Winner*, 17 Kans. 298–300.'

"The two cases in the United States Supreme Court are not express authorities in favor of this doctrine. In both cases it appeared that the assignment was only a device to cover up the real transaction which was an insurance in favor of one having no interest in the life insured. The original scheme was the procuring of an insurance which would be void as a wagering contract were it taken out in the name of the party who intended to effect the insurance and derive the benefit from it. To conceal the true nature of the transaction from the condemnation of the law, the plan of an assignment was resorted to. And it has been held in several cases that where the original procuring of the policy and the subsequent assignment are but parts of the same scheme, and the object of the parties from the inception of the transaction is to enable one having no insurable interest to hold a life policy in contravention of the common-law rule condemning such policies, the insurance is void. *Swick* v. *Home Ins. Co.*, 2 Dill. 160; *Brockway* v. *Mut. Benefit Life Ins. Co.*, 9 Fed. Rep. 249; *Stevens* v. *Warren*, 101 Mass. 566.

"In *Olmsted* v. *Keyes* this principle is recognized. The court, after enunciating the general rule of the validity of the assignment, even in favor of one having no interest in the life insured, attached to it the condition that the policy 'was not procured or the assignment made as a contrivance against betting, gaming and wagering policies.'

"**Burden of proof.** Whether the burden is on the plaintiff to show that he had an insurable interest in the life of the insured or not, is not definitely settled.

"In *Ruse* v. *Mut. Benefit Life Ins. Co.*, 23 N. Y. 516; and *Guard. Mut. Life Ins. Co.* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180, the court decided that the plaintiff must affirmatively establish that he had such insurable interest. In the first case the judgment was reversed on the ground that the plaintiff had not shown an insurable interest in the life insured, the court saying: 'It is said that the defendants by issuing the policy upon the representation of the plaintiff that he had an interest have admitted his interest and that the production of the policy is at least *prima facie* evidence of such interest. This position cannot be sustained. All the older authorities show that even in actions upon marine policies not containing the clause 'interest or no interest,' it was necessary to aver and of course to prove the interest of the plaintiff. It is an indispensable part of the plaintiff's case to be made out affirmatively at the trial. Upon this ground therefore as well as that before considered, the judgment of the Supreme Court must be reversed, and there must be a new

trial with costs to abide the event. All the judges except DAVIES and MASON, JJ., concurred that the plaintiff must show an interest in the life insurance. This reasoning is undoubtedly sound if we assume that every policy is void unless the plaintiff has an insurable interest. But that, as we have already seen, is not the law. A policy will be valid even without an insurable interest in the person to whom the amount is made payable provided it is not a merely wagering contract. Therefore as a valid insurance may be effected without an insurable interest in the life insured it would be extremely illogical to make it incumbent on the plaintiff to show such insurable interest as a condition precedent to his right to recover. It would be requiring him to establish a fact the existence of which is not indispensable to the maintenance of his action; and if rigidly enforced it would absolutely annul the rule above referred to sustaining a policy where the person insured has no interest in the life insured, for in many cases the plaintiff would be unable to show an insurable interest, for the simple reason that he has none, and yet the policy might fall directly within the protection of the rule which declares valid insurances without any interest in the life insured. The more logical doctrine is that which has been finally established by the New York Court of Appeals in *Goodwin* v. *Mass. Mut. Life Ins. Co.*, 73 N. Y. 480, in which the court say: 'It is also insisted that the policy in question was a wager policy, and as such was absolutely void by the Revised Statutes. We think that the defendant to avail itself of any such defense, should have set it up by answer, and thus give the plaintiff an opportunity to meet such an issue. In *Valton* v. *National Fund Life Assurance Co.*, 20 N. Y. 32, a motion was made upon the trial for a nonsuit upon this ground among others, and it was held that the fact that the answer did not set up as a defense that the policy was made in contravention of the statute was a sufficient answer to the point made. If the objection had been raised by answer or on motion to dismiss the complaint, it is not apparent but that it might have been proved that the policy was issued upon the application of the insured or that he insured his own life and the objection thus have been obviated. The defense is an affirmative one and should have been presented on the trial and not afterward.' See also *Forbes* v. *American Mut. Life Ins. Co.*, 15 Gray, 249.

"**Control of policy by insured.** Although it may be regarded as practically settled that a person may effect a valid insurance on his own life in favor of one who has no insurable interest, the question whether such insurance when once effected vests in the beneficiary an absolute and indefeasible title to the policy or whether such interest is subject to the control of the person taking out the policy, is a question on which the authorities are in a state of irreconcilable conflict. The following authorities hold that the beneficiary has only an inchoate interest in the policy, and that his ultimate enjoyment of its proceeds is dependent on the will of the person effecting the insurance. *Clark* v. *Durand*, 12 Wis. 223; *Gambs* v. *Conn. Mut. Life Ins. Co.*, 50 Mo. 44; *Swift* v. *R. P., etc., Association*, 96 Ill. 309; *Landrum* v. *Knowles*, 23 N. J. Eq. 594. *Union Mut. Life Ins. Co.* v. *Stevens*, 19 Fed. Rep. 671; *Foster* v. *Gile*, 50 Wis. 603; *Kerman* v. *Howard*, 23 Wis. 108; *Bickerton* v. *Jaques*, 28 Hun, 119; *Garner* v. *Germania Life Ins. Co.*, 32 Alb. L. J. 91. See also *Valley Mut. Life Ins. Co.* v. *Burke* (Virginia), 15 Rep. 572; s. c., 12 Ins. L. J. 337; *Richard*

son v. *Kentucky Grangers' Benefit Soc.*, 1 Ky. L. Rep. & J. 785. There is much force in the arguments by which the courts have sustained and justified this doctrine.

"In *Garner* v. *Germania Life Ins. Co.*, the New York Common Pleas supported its decision that the rights of the beneficiary were not absolute, by the following very cogent argument: 'There may be many reasons why the right to transfer such an insurance from one beneficiary to another even in the case of children should exist. In the course of years this pecuniary condition may be materially improved by marriage, success in business or other causes, so that it may be more desirable and just that others who have claims upon the insurer and who are in greater need should have the benefit of the sum secured by the insurance instead of those for whom it was originally intended. When therefore the insurer keeps the policy entirely in his own possession, he alone paying the premiums, he should with the consent of the insurance company have the same right to revoke, alter or change it that he would have in respect to a will; for like the provisions in a will it is a gift that is to take effect upon his death. He may of course put an end to it by ceasing to pay the annual premium; but there is no reason why his right should be limited to this, and that where for reason satisfactory to him he desires to transfer the benefit of it to another, he should have to lose all the premiums he may have paid over a long course of years, and be compelled to pay for a new policy the increased premium consequent upon his increase of years.'

"In *Bickerton* v. *Jaques*, and *Gambs* v. *Conn. Mut. Life Ins. Co.*, it appeared that the change was made after the death of the beneficiary; but this fact does not render these two cases any the less authoritative on this point, because it would inevitably follow that the representatives of the beneficiary would take his interest were the policy irrevocable, and it would therefore not be competent for the person taking out the insurance to destroy their interest in the policy, any more than the interest of the beneficiary himself.

"In *Hutson* v. *Merrifield*, 51 Ind. 24, the court decided that the representatives would take the interest of the beneficiary where the policy was not cancelled by the person procuring it during his life-time.

"On the other hand the cases which hold that the beneficiary has an indestructible interest in the policy are quite numerous. *Lemon* v. *Phœnix Life Ins. Co.*, 38 Conn. 294; *Ricker* v. *Charter Oak Life Ins. Co.*, 27 Minn. 193; s. c., 38 Am. Rep. 289; *Pilcher* v. *N. Y. Life Ins. Co.*, 33 La. Ann. 382; Bliss Life Ins., §§ 317-337; *Brockhaus* v. *Kemna*, 7 Fed. Rep. 609; *Wilmaser* v. *Continental Life Ins. Co.* (Iowa Sup. Ct.), 28 N. W. Rep. 903; *Stilwell* v. *Mut. Life Ins. Co.*, 72 N. Y. 385-391; *Weston* v. *Richardson*, 47 L. T. R. (N. S.) 514; *Valley Mut. Life Ins. Co.* v. *Burke*, 7 Vir. L. J. 173; *Glanz* v. *Gloeckler*, 104 Ill. 573; s. c., 44 Am. Rep. 94; *Crittenden* v. *Phœnix Life Ins. Co.*, 41 Mich. 442.

"Some of these cases were decided on the ground that the circumstances of the transaction constituted a valid executed gift of the policy, and that the title to the policy was thus vested in the beneficiary as irrevocably as the title to any other personal property would have been under the same circumstances. In the following cases the decisions were made upon that ground: *Lemon* v. *Phœnix Life Ins. Co.*; *Pilcher* v. *N. Y. Life Ins. Co.* In these cases it appeared

that the policy was delivered to the beneficiary who paid the premiums. But in *Ricker* v. *Charter Oak Life Ins. Co.*, and *Weston* v. *Richardson*, the rights of the beneficiary were held to be indefeasible, even though the person whose life was insured paid the premiums and kept possession of the policy. The rule established by the majority of the cases that the interest of the beneficiary is not absolute is undoubtedly sound. The beneficiary is not a party to the contract; he pays no portion of the premium; the policy is not in his possession; it has never been given to him because delivery is essential to the validity of gift. On what principle can he claim a vested, irrevocable title to it? Neither law nor equity supports such claim. But when the beneficiary has possession of the policy and pays the premiums, the title to the policy may very properly be held to be vested irrevocably in him. The proposition that the moment a policy is issued the beneficiary acquires an absolute and indestructible interest in it without possession of the policy or payment of premiums is too untenable to require argument to refute it. However the case of *Stilwell* v. *Mut. Life Ins. Co.*, already cited, seems to sustain it. The action was to procure the restoration of a policy which had been taken out by a husband on his own life in favor of his wife, and the premiums on which had been paid by him, but which had been surrendered by the husband. It does not expressly appear whether the husband kept possession of the policy, but there is nothing in the case to indicate that he even delivered it to his wife or to any one for her. From the fact that he himself surrendered it to the company without the knowledge or consent of his wife, it is quite certain that he then had possession of it, and the natural inference therefore is that he always retained possession of it from its inception. The court below granted the relief prayed for on two grounds: First, that the surrender was obtained through duress. Second, that the husband had no power to surrender because it was the property of his wife. On appeal the court said: 'If the policy had been his own property and in his own name as before stated we should have some difficulty in sustaining the judgment on the ground of coercion, restraint or duress; but it is unnecessary to determine this point definitely. The other ground of action I regard as more formidable, viz., a want of power to make the surrender without the consent of the plaintiff' (the wife.) 'When this policy was taken by the husband although he paid the premium from his own means, and even regarding it as a provision for the wife, it was irrevocable so far as he was concerned.'

"The court decided that he had no right to surrender the policy, and thus expressly adjudged her interest in it to be absolute and subject to no other control than her own. It cannot be said that the case was decided on the statute which makes provision for the issuing of policies on the lives of husband in favor of wives because the statute was in no manner referred to in the opinion."

CASES

IN THE

SUPREME COURT

OF

TENNESSEE.

HOPE v. WILKINSON.

(14 Lea, 21.)

Will — legatee — subrogation to creditors — payment out of realty.

A legatee whose legacy has been absorbed in payment of the debts of the testator, may have it out of undivided realty by subrogation to the rights of creditors.

BILL to charge real estate with legacy. The opinion states the case. The defendant had judgment below.

T. L. Dodd and *G. B. Guild,* for complainants.

East & Fogg, Dickinson & Frazer and *Smith & Allison,* for defendants.

FREEMAN, J. This case is as follows: Micajah Wilkinson died in Davidson county, in 1874, possessed of a large estate. He left a will by which he gave to complainants all his estate, both real and personal, but it was attested by only one witness, and therefore failed to be effectual to carry the realty; as to the personalty however it was good.

The administrators with the will annexed have proceeded to wind up the estate, and the bill charges, have collected $16,894, with a

large amount still uncollected. They have also disbursed considerable sums in expenses of administration — five or six thousand dollars or more having been applied to payment of debts. While conceding that the general rule is, that the personalty is primarily liable for the payment of debts, it is claimed by the bill that where there is no devise of the realty, and it descends to the heir, the personalty being given, as in this case, then if the administrator uses the personalty in payment of debts, the legatee is entitled to stand in the place of the creditors whose debts have been paid, and go upon the undivided realty for reimbursement by subrogation. In other words, the theory of the bill is, that the ineffectually devised realty is the primary fund out of which the debts should be paid in preference to personalty bequeathed, as has been done in this case, and that the personalty having been applied to payment of debts, the legatee is entitled to be reimbursed to this extent by charging the realty descended with that sum.

The will of Micajah Wilkinson is as follows: "I give and bequeath to my friends, Blanche Knight, aged about thirteen years; Micajah Knight, aged about nine years; Ida Jane, aged about five years; Sallie, aged about four years; Tom Smiley, aged about one year, all my personal and real estate in the counties of Robertson and Davidson, and all other property of any description, both real and personal, bonds, notes, evidences of debt; and I specially desire and request that Elizabeth Knight shall have out of my estate the sum of two hundred dollars each year, over and above all other claims or creditors. I make this will as a matter of justice and affection."

A demurrer to this bill was sustained by the chancellor, on the ground that the will did not provide for the payment of the debts, that no particular fund was charged with their payment, and no part of the estate exonerated, and no intent indicated by the testator to change the legal order of appropriation of his assets in application to debts; therefore the personalty was the primary fund for their payment, and so complainants not entitled to relief. The referees however report in favor of a reversal of the decree, to which exceptions are filed opening the entire case.

That the personalty as a general rule is the primary fund for payment of debts at common law is beyond question, and this rule is adopted, if not emphasized, in our State by an act of 1827: Thompson & Steger's Code, section 2267, requiring proof of "ex-

haustion of the personal estate in the payment of debts, before the real assets can be subject to unpaid debts, as against the heir." This is all clear.

We can give no effect whatever to the ineffectual attempt to devise the realty by this will, by way of learning the intention of the testator. Such an effort is not a legal expression of a purpose, and being ineffectual by law, must go for nothing in solving the question for decision. *Hays* v. *Jackson*, 6 Mass. 156.

At common law the realty was only chargeable in the hands of the heir with special debts. But under our system all debts stand in equal degree, and are equally a charge on the legal or equitable assets of an intestate or testator — the principle however being still adhered to rigidly that the personalty is the primary fund for this purpose — the land only to be reached in the hands of the heir, in a proceeding under the act of 1827, Code, section 5, cited; or by *sci. fa.*, in either of which modes however the heir is to be made party, with the right to show the personalty has not been exhausted, and to insist on its appropriation in exoneration of his estate, if he can do so.

In case there be a will, the same rule prevails, and the creditor is entitled to enforce his debt against the personalty at law in the hands of the representative, regardless of the provisions of the will, if by any process he can reach it. So that under a judgment and execution in this case, a creditor could have appropriated the entire personalty to the payment of his debt, and the administrator would have been powerless to prevent it. The debts then have been properly paid by the administrators in this case, as between them and the creditor. The question is whether there is an equity, by reason of such payment, as between the legatees and the heir, by which the former, whose legacies or bequests have been thus lessened, to have reimbursement out of the realty descended.

In the will before us, there is no exoneration of the personalty in terms from payment of debts, nor is any other fund charged with them. It is simply the case of a general bequest of the entire personalty to the parties named as the special objects of the testator's bounty, while the land descends to the heir, without any legal intention expressed in reference to it.

Courts of equity have established certain rules for marshalling the assets, and for their appropriation, by which the equities of parties are substantially met. The general principle that underlies these

is that the assets shall be so appropriated that every claimant shall be satisfied, so far as such assets can by any arrangement, consistent with their respective claims, be applied in satisfaction thereof. 1 Story Eq. Jur., § 561. If for instance, a specialty creditor, whose debt in England was a lien on the real estate, receive satisfaction out of the personalty, a simple contract creditor, who had no claim, except on the personal assets, shall in equity stand in the place of the specialty creditor as against the real estate so far as the latter was exhausted the personal assets in payment of his debts, and no further, and this because the specialty creditor could go against both personal and real estate, or against either of them. His choice to defeat the simple contract creditor, when he might have satisfied his debt out of the realty, is the basis of this equity." 1 Story Eq. Jur., § 562.

"In general, legatees are entitled," says Judge Story, "to the same equities where the personal estate is exhausted by specialty creditors, for they would otherwise be without the means of receiving the bounty of the testator. They are therefore entitled to stand in the place of specialty creditors against real assets descended to the heir — so they are permitted in like manner, to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage. But their equity will not prevail against a devisee of the real estate not mortgaged, for he also takes by the bounty of the testator, and between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other." Story Eq. Jur. 565. The principle underlying this is, that the bounty of the testator raises an equity in favor of a legatee that ought not to be defeated.

So the bounty of the testator entitles a legatee to marshal the assets, and the choice of the creditors to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy, 1 Wait Act. & Def. 353, for which is cited *Post* v. *Mackall*, 3 Bland. 486; *Mollan* v. *Griffith*, 3 Paige, 402; *Robards* v. *Wortham*, 2 Dev. Eq. 173, and other cases.

This is the principle of the case of *Alexander* v. *Miller*, 7 Heisk. 77, Judge DEADERICK says, quoting from Story Eq. Jur., note 5: "If there be no devise of the real estate, but it descends, if the creditor exhaust the personalty, then as against the heir the legatees may stand in the place of the creditors, and come upon the real

estate which has descended." Further it is said, it is held that the mere bounty of the testator enables the legatee to call for this species or marshalling; and so it was held in that case, irrespective of the question whether the legacies were specific or general, that the legatee had the right to go on real estate descended in the hands of the heir where his legacy had been taken to pay debts.

The principle we think is sound, notwithstanding there be an uncertainty of decision on the question. The testator has, in the exercise of his legal right, given his personalty to a chosen object of his bounty. This gift is defeated by claims of creditors. Why should parties who take the realty by descent hold it free from debt, and thereby practically defeat the will of the testator?

The principle approved in the above case "that every will ought to be read, as in effect embodying the declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention," is sound, and covers the question under consideration.

The question simply in such a case is, whether the gift of the testator is a legal and meritorious right, that should be protected, above the right of the mere heir on whom the law casts the estate. We think the former the higher claim.

The principle cited from Story, that as between legatees and devisees under the same will, both being equally the object of the testator's bounty, there will be no marshalling, implies and rests on the proposition that the bounty of the testator raises an equity, and where it is shown equally as to both realty and personalty, the equities are equal, one counterbalancing the other. It is equally implied that if there is a bequest, and no counterbalancing equity in the way of devise of the land, the bequest itself would raise an equity superior in the legatee to the right of the mere heir.

So in stating the doctrine on this subject, Mr. Pomeroy, 3 Eq. Jur., § 1135, says: "Property undisposed of by the will is primarily liable to debts, in preference to that which is expressly bequeathed or devised." We need but add, this equity is marked out in all ordinary cases by subrogation, that is, not by postponing the creditor in payment of his debt, but by allowing the legatee who has had his legacy abated or absorbed in payment of debts, to stand in the place of the creditor as to undevised realty: See 3 Pom. Eq. 75, note 6. This is in accord with the case of *Alexander*, and we think

is that the assets shall be so appropriated that every claimant shall be satisfied, so far as such assets can by any arrangement, consistent with their respective claims, be applied in satisfaction thereof. 1 Story Eq. Jur., § 561. If for instance, a specialty creditor, whose debt in England was a lien on the real estate, receive satisfaction out of the personalty, a simple contract creditor, who had no claim, except on the personal assets, shall in equity stand in the place of the specialty creditor as against the real estate so far as the latter was exhausted the personal assets in payment of his debts, and no further, and this because the specialty creditor could go against both personal and real estate, or against either of them. His choice to defeat the simple contract creditor, when he might have satisfied his debt out of the realty, is the basis of this equity." 1 Story Eq. Jur., § 562.

"In general, legatees are entitled," says Judge Story, "to the same equities where the personal estate is exhausted by specialty creditors, for they would otherwise be without the means of receiving the bounty of the testator. They are therefore entitled to stand in the place of specialty creditors against real assets descended to the heir — so they are permitted in like manner, to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage. But their equity will not prevail against a devisee of the real estate not mortgaged, for he also takes by the bounty of the testator, and between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other." Story Eq. Jur. 565. The principle underlying this is, that the bounty of the testator raises an equity in favor of a legatee that ought not to be defeated.

So the bounty of the testator entitles a legatee to marshal the assets, and the choice of the creditors to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy, 1 Wait Act. & Def. 353, for which is cited *Post* v. *Mackall*, 3 Bland. 486; *Mollan* v. *Griffith*, 3 Paige, 402; *Robards* v. *Wortham*, 2 Dev. Eq. 173, and other cases.

This is the principle of the case of *Alexander* v. *Miller*, 7 Heisk. 77, Judge DEADERICK says, quoting from Story Eq. Jur., note 5: "If there be no devise of the real estate, but it descends, if the creditor exhaust the personalty, then as against the heir the legatees may stand in the place of the creditors, and come upon the real

estate which has descended." Further it is said, it is held that the mere bounty of the testator enables the legatee to call for this species or marshalling; and so it was held in that case, irrespective of the question whether the legacies were specific or general, that the legatee had the right to go on real estate descended in the hands of the heir where his legacy had been taken to pay debts.

The principle we think is sound, notwithstanding there be an uncertainty of decision on the question. The testator has, in the exercise of his legal right, given his personalty to a chosen object of his bounty. This gift is defeated by claims of creditors. Why should parties who take the realty by descent hold it free from debt, and thereby practically defeat the will of the testator?

The principle approved in the above case "that every will ought to be read, as in effect embodying the declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention," is sound, and covers the question under consideration.

The question simply in such a case is, whether the gift of the testator is a legal and meritorious right, that should be protected, above the right of the mere heir on whom the law casts the estate. We think the former the higher claim.

The principle cited from Story, that as between legatees and devisees under the same will, both being equally the object of the testator's bounty, there will be no marshalling, implies and rests on the proposition that the bounty of the testator raises an equity, and where it is shown equally as to both realty and personalty, the equities are equal, one counterbalancing the other. It is equally implied that if there is a bequest, and no counterbalancing equity in the way of devise of the land, the bequest itself would raise an equity superior in the legatee to the right of the mere heir.

So in stating the doctrine on this subject, Mr. Pomeroy, 3 Eq. Jur., § 1135, says: "Property undisposed of by the will is primarily liable to debts, in preference to that which is expressly bequeathed or devised." We need but add, this equity is marked out in all ordinary cases by subrogation, that is, not by postponing the creditor in payment of his debt, but by allowing the legatee who has had his legacy abated or absorbed in payment of debts, to stand in the place of the creditor as to undevised realty: See 3 Pom. Eq. 75, note 6. This is in accord with the case of *Alexander*, and we think

is that the assets shall be so appropriated that every claimant shall be satisfied, so far as such assets can by any arrangement, consistent with their respective claims, be applied in satisfaction thereof. 1 Story Eq. Jur., § 561. If for instance, a specialty creditor, whose debt in England was a lien on the real estate, receive satisfaction out of the personalty, a simple contract creditor, who had no claim, except on the personal assets, shall in equity stand in the place of the specialty creditor as against the real estate so far as the latter was exhausted the personal assets in payment of his debts, and no further, and this because the specialty creditor could go against both personal and real estate, or against either of them. His choice to defeat the simple contract creditor, when he might have satisfied his debt out of the realty, is the basis of this equity." 1 Story Eq. Jur., § 562.

"In general, legatees are entitled," says Judge Story, "to the same equities where the personal estate is exhausted by specialty creditors, for they would otherwise be without the means of receiving the bounty of the testator. They are therefore entitled to stand in the place of specialty creditors against real assets descended to the heir — so they are permitted in like manner, to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage. But their equity will not prevail against a devisee of the real estate not mortgaged, for he also takes by the bounty of the testator, and between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other." Story Eq. Jur. 565. The principle underlying this is, that the bounty of the testator raises an equity in favor of a legatee that ought not to be defeated.

So the bounty of the testator entitles a legatee to marshal the assets, and the choice of the creditors to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy, 1 Wait Act. & Def. 353, for which is cited *Post* v. *Mackall*, 3 Bland. 486; *Mollan* v. *Griffith*, 3 Paige, 402; *Robards* v. *Wortham*, 2 Dev. Eq. 173, and other cases.

This is the principle of the case of *Alexander* v. *Miller*, 7 Heisk. 77, Judge DEADERICK says, quoting from Story Eq. Jur., note 5: "If there be no devise of the real estate, but it descends, if the creditor exhaust the personalty, then as against the heir the legatees may stand in the place of the creditors, and come upon the real

estate which has descended." Further it is said, it is held that the mere bounty of the testator enables the legatee to call for this species or marshalling; and so it was held in that case, irrespective of the question whether the legacies were specific or general, that the legatee had the right to go on real estate descended in the hands of the heir where his legacy had been taken to pay debts.

The principle we think is sound, notwithstanding there be an uncertainty of decision on the question. The testator has, in the exercise of his legal right, given his personalty to a chosen object of his bounty. This gift is defeated by claims of creditors. Why should parties who take the realty by descent hold it free from debt, and thereby practically defeat the will of the testator?

The principle approved in the above case "that every will ought to be read, as in effect embodying the declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention," is sound, and covers the question under consideration.

The question simply in such a case is, whether the gift of the testator is a legal and meritorious right, that should be protected, above the right of the mere heir on whom the law casts the estate. We think the former the higher claim.

The principle cited from Story, that as between legatees and devisees under the same will, both being equally the object of the testator's bounty, there will be no marshalling, implies and rests on the proposition that the bounty of the testator raises an equity, and where it is shown equally as to both realty and personalty, the equities are equal, one counterbalancing the other. It is equally implied that if there is a bequest, and no counterbalancing equity in the way of devise of the land, the bequest itself would raise an equity superior in the legatee to the right of the mere heir.

So in stating the doctrine on this subject, Mr. Pomeroy, 3 Eq. Jur., § 1135, says: "Property undisposed of by the will is primarily liable to debts, in preference to that which is expressly bequeathed or devised." We need but add, this equity is marked out in all ordinary cases by subrogation, that is, not by postponing the creditor in payment of his debt, but by allowing the legatee who has had his legacy abated or absorbed in payment of debts, to stand in the place of the creditor as to undevised realty: See 3 Pom. Eq. 75, note 6. This is in accord with the case of *Alexander*, and we think

is that the assets shall be so appropriated that every claimant shall be satisfied, so far as such assets can by any arrangement, consistent with their respective claims, be applied in satisfaction thereof. 1 Story Eq. Jur., § 561. If for instance, a specialty creditor, whose debt in England was a lien on the real estate, receive satisfaction out of the personalty, a simple contract creditor, who had no claim, except on the personal assets, shall in equity stand in the place of the specialty creditor as against the real estate so far as the latter was exhausted the personal assets in payment of his debts, and no further, and this because the specialty creditor could go against both personal and real estate, or against either of them. His choice to defeat the simple contract creditor, when he might have satisfied his debt out of the realty, is the basis of this equity." 1 Story Eq. Jur., § 562.

"In general, legatees are entitled," says Judge Story, "to the same equities where the personal estate is exhausted by specialty creditors, for they would otherwise be without the means of receiving the bounty of the testator. They are therefore entitled to stand in the place of specialty creditors against real assets descended to the heir — so they are permitted in like manner, to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage. But their equity will not prevail against a devisee of the real estate not mortgaged, for he also takes by the bounty of the testator, and between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other." Story Eq. Jur. 565. The principle underlying this is, that the bounty of the testator raises an equity in favor of a legatee that ought not to be defeated.

So the bounty of the testator entitles a legatee to marshal the assets, and the choice of the creditors to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy, 1 Wait Act. & Def. 353, for which is cited *Post* v. *Mackall*, 3 Bland. 486; *Mollan* v. *Griffith*, 3 Paige, 402; *Robards* v. *Wortham*, 2 Dev. Eq. 173, and other cases.

This is the principle of the case of *Alexander* v. *Miller*, 7 Heisk. 77, Judge DEADERICK says, quoting from Story Eq. Jur., note 5: "If there be no devise of the real estate, but it descends, if the creditor exhaust the personalty, then as against the heir the legatees may stand in the place of the creditors, and come upon the real

estate which has descended." Further it is said, it is held that the mere bounty of the testator enables the legatee to call for this species or marshalling; and so it was held in that case, irrespective of the question whether the legacies were specific or general, that the legatee had the right to go on real estate descended in the hands of the heir where his legacy had been taken to pay debts.

The principle we think is sound, notwithstanding there be an uncertainty of decision on the question. The testator has, in the exercise of his legal right, given his personalty to a chosen object of his bounty. This gift is defeated by claims of creditors. Why should parties who take the realty by descent hold it free from debt, and thereby practically defeat the will of the testator?

The principle approved in the above case "that every will ought to be read, as in effect embodying the declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention," is sound, and covers the question under consideration.

The question simply in such a case is, whether the gift of the testator is a legal and meritorious right, that should be protected, above the right of the mere heir on whom the law casts the estate. We think the former the higher claim.

The principle cited from Story, that as between legatees and devisees under the same will, both being equally the object of the testator's bounty, there will be no marshalling, implies and rests on the proposition that the bounty of the testator raises an equity, and where it is shown equally as to both realty and personalty, the equities are equal, one counterbalancing the other. It is equally implied that if there is a bequest, and no counterbalancing equity in the way of devise of the land, the bequest itself would raise an equity superior in the legatee to the right of the mere heir.

So in stating the doctrine on this subject, Mr. Pomeroy, 3 Eq. Jur., § 1135, says: "Property undisposed of by the will is primarily liable to debts, in preference to that which is expressly bequeathed or devised." We need but add, this equity is marked out in all ordinary cases by subrogation, that is, not by postponing the creditor in payment of his debt, but by allowing the legatee who has had his legacy abated or absorbed in payment of debts, to stand in the place of the creditor as to undevised realty: See 3 Pom. Eq. 75, note 6. This is in accord with the case of *Alexander*, and we think

is killed, A. is guilty of murder, but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. This we think a different case from the one at bar, for both participated in the killing, the master with malice, the servant without malice, but to assist his master.

In 1 Bish. Cr. Law., § 439, it is said: "The true view is doubtless as follows: Every man is responsible, criminally, for what of wrong flows directly from his corrupt intentions; but no man intending wrong is responsible for an independent act of wrong committed by another." "If the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be partaker with the doer in a different wrong." This is said in a case where there is concert of action between the wrongdoer, and the reason of the non-liability for the act of another, in which the defendant neither participated nor intended to participate, is still stronger, there being no concert of action between B. F. and J. T. White, either as to the affray or the stabbing.

The charge of his honor the Circuit judge makes B. F. White responsible for the act of J. T. White, which he neither consented to, advised, or knew of, for we think it satisfactorily appears that B. F. White did not know that Conly was stabbed until they were separated; nor did J. T. White participate in the quarrel, or say or do any thing indicating a purpose to interfere, until he stabbed deceased. The injuries inflicted by B. F. White upon Conly were slight. The injury of which he died was not inflicted by B. F. White, nor by his procurement, advice, consent or knowledge, and it cannot be said that what he did was the natural or proximate cause of the death of Conly. To constitute a claim for damages, the party against whom they are claimed must be chargeable with the loss. The loss or injury must be the natural and proximate consequence of the wrong. 9 Heisk. 851. And in *Manier* v. *State*, 6 Baxt. 600, it is said, in every unlawful homicide the killing must be done by the party charged, or by another in complicity with him, or it must be the natural and reasonable sequence of some unlawful or negligent act in which the accused is engaged, and it is added, it would be monstrous to hold that when a party intended to kill, but did not kill, and a party with whom he was in no complicity accidentally or recklessly kills the adversary, of the first party, that the latter should suffer the consequences of such reckless or casual

act; much less could such a doctrine be supported when there is no such intent. We think this is the sounder doctrine, and it in effect overrules the case of *Beets* v. *State*; 1 Bish. Cr. Law, §§ 433–440.

We hold therefore that the charge in this case was erroneous, and that the report of the referees should be set aside, and the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial as to B. F. White.

Judgment reversed.

NOTE BY THE REPORTER.— The cases reported in this series on proximate and remote causes of injury and proximate and remote damages in cases of negligence have become so numerous that it has been deemed convenient to group them by reference in a single note as follows:

Communication of fire. A warehouse situated near the railroad track was set on fire by sparks from one of defendant's locomotives. The burning warehouse communicated fire to plaintiff's hotel (situated thirty-nine feet distant), whereby it was consumed. *Held*, that the defendant was not liable for the destruction of the hotel, or property therein, by reason of the injury being too remote. *Penn. Railroad* v. *Kerr* (62 Penn. St. 353), 1 Am. Rep. 431.

But this case was explained and qualified by the same court, and it was *held*, when fire was communicated by a locomotive to a cross-tie of the track and spread thence through rubbish and dry grass to plaintiff's lands, about six hundred feet from the railroad, that it was for the jury to determine whether the injury to plaintiff's land was the natural and probable consequence of the first firing. *Penn. R. Co.* v. *Hope* (80 Penn. St. 373), 21 Am. Rep. 100

Through the negligence of defendant, a railroad company, sparks from a locomotive set fire to a warehouse. The wind was high, and the building of plaintiff's, two hundred feet from the warehouse, took fire therefrom, and was consumed. In an action to recover for the loss of plaintiff's building, *held*, that the question of proximate or remote cause was for the jury, to be determined under the instruction that the railroad company is to held responsible, if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but it is not to be held responsible for injuries which could not have been foreseen or expected as the results of a negligence or misconduct. *Fent* v. *Toledo, etc., Ry. Co.* (59 Ill. 349), 14 Am. Rep. 13.

The fact that natural agencies, as high winds or drought, contributed to cause the injury, or that the property destroyed was at a distance from the place where the fire originated, does not affect the question as to the liability of the railroad company, or render the fire the remote and not the proximate cause of the injury done. *Kellogg* v. *Chicago, etc., R. Co.* (26 Wis. 223), 7 Am. Rep. 69, and note, 80.

In a time of extreme drought, one of defendant's locomotives, in passing along its road, opposite plaintiff's land, dropped live coals upon the track, which set fire to a tie; the fire thence communicated to weeds, grass and rubbish, which defendant had suffered to accumulate by the side of its track, and thence it spread to plaintiff's land, burning and destroying his growing forest

trees. *Held*, that the damages to plaintiff were not too remote. *Webb* v. *Rome, etc., R. Co.* (49 N. Y. 420), 10 Am. Rep. 389.

Sparks from a locomotive kindled fires on lands of two different owners; the fires united, and after passing over the lands of other owners, reached plaintiff's land four miles away, and did damage thereon. *Held*, that the damages were not too remote, and the company was liable. *Atchison, Topeka, etc., R. Co.* v. *Stanford* (12 Kans. 354), 15 Am. Rep. 362.

A railroad company is liable for injury to land by fire, caused by its negligence, although there is land belonging to another owner intermediate between the railroad and the plaintiff's land. *Delaware, etc., R. Co.* v. *Salmon* (39 N. J. 299), 23 Am. Rep. 214.

Where grass is set burning by the fire escaping from a locomotive, and the owner sues the company, the damages claimed will not be held too remote or speculative, although the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter. *Clemens* v. *Hannibal, etc., R. Co.* (53 Mo. 366), 14 Am. Rep. 460.

A building belonging to a railroad company took fire from sparks from one of their engines, and from this building fire was blown across the street to the storehouse of P., which, with several thousand dollars in money contained therein, was consumed. In an action by P. to recover for the loss, *held*, that the question whether the injury sustained was too remote, was for the jury. *Toledo, etc., R. Co.* v. *Pindar* (53 Ill. 447), 5 Am. Rep. 57.

Sparks from a railroad locomotive set fire to the prairie adjoining the company's way at a place where the grass was very rank and dry. The wind being high the fire extended some three miles before night, and continued to burn during the night, though slowly. The following morning the wind rose again and blew hard, as was not unusual in that country, carrying the fire some five miles further, to the plaintiff's farm, where it swept over a fire-line of sixteen feet of plowed ground, and destroyed plaintiff's property. In an action of damages against the company, *held*, that the plaintiff was entitled to recover. *Poeppers* v. *Missouri, etc., R. Co.* (67 Mo. 715), 29 Am. Rep. 518.

An oil train on defendant's railway was thrown from the track by a recent land slide, and the oil tanks bursting, the oil became ignited and ran down into an adjoining creek, swoolen by recent rains, and flowing down the creek, set fire to and destroyed the plaintiff's buildings three or four hundred feet distant. *Held*, that even if defendants were negligent, the damage was too remote to warrant a recovery. *Hoag* v. *Lake Shore, etc., R. Co.* (85 Penn. St. 293), 27 Am. Rep. 653.

A railway locomotive engine emitted sparks to land adjoining the plaintiff's, where they ignited leaves, briers, brush, stumps and logs, and the fire was continuously conducted by the same, in about two hours, to a pile of lumber on the plaintiff's land, three hundred feet distant, which it consumed. The weather was dry and the wind was high in that direction. There was some evidence of another origin. *Held*, that it was a question of fact whether the defendant's negligence was the proximate cause of injury. *Lehigh Valley Railroad Co.* v. *McKeen* (90 Penn. St. 122), 35 Am. Rep. 644.

The defendant having accidentally but negligently set his own building on fire, the flames were carried by the wind to the plaintiffs' building and consumed it. *Held*, that defendant was not liable. *Pennsylvania Co.* v. *Whitlock* (99 Ind. 16), 50 Am. Rep. 71.

Carrier — breach of contract — sickness. In an action by a passenger against a railway company for wrongfully carrying her beyond her destination, evidence that she was compelled to walk three hours over dusty roads, that she got wet in crossing a creek, was chased by dogs and otherwise frightened, and that the weather was sultry, by means whereof she was made sick, is competent. *Cincinnati, etc., R. Co.* v. *Eaton* (94 Ind. 474), 48 Am. Rep. 179.

——. A pregnant woman, passenger on a railway train, was carelessly directed by the brakeman to leave the train at a station three miles short of her destination. This was on a cloudy night, she could not see the station, and being a stranger there, she walked until she reached her destination. The exertion brought on a miscarriage and sickness. *Held*, that the defendant was liable for this injury. *Brown* v. *Chicago, etc., R. Co.* (54 Wis. 342), 41 Am. Rep. 41.

—— **fright.** In an action by a married woman to recover damages for fright which caused a miscarriage, it appearing that the fright was occasioned by a quarrel between the defendant and the plaintiff's husband and another, within her hearing but out of her sight, but it not appearing that the defendant knew that she heard it or knew of her condition, *held*, that no recovery could be had. *Phillips* v. *Dickerson* (85 Ill. 11), 28 Am. Rep. 607.

—— **negligence — sickness.** If a passenger has sustained a personal injury by the negligence of a carrier, which results in a cancer, damages may be awarded for that result. *Baltimore City Passenger Railway Company* v. *Kemp* (61 Md. 619), 48 Am. Rep. 134.

——. By reason of a defect in a street the plaintiff's axle was broken, and he was dragged over the dash board. He procured another carriage, and drove home several miles in a cold rain. His evidence showed that he suffered injury from the strain and shock. The defendant's evidence showed that his injuries resulted from the subsequent exposure. The jury found that they resulted from both. *Held*, that a recovery was justified whether the injuries proceeded from the strain and shock or from the subsequent exposure, or both. *Ehrgott* v. *Mayor, etc.* (96 N. Y. 264), 48 Am. Rep. 622.

——. A passenger on a railway negligently carried beyond her destination, but receiving no personal injury or insult, may not recover for anxiety, effects on her health, nor danger in consequence of the train stopping an insufficient time to enable her to get off. *Trigg* v. *St. Louis, Kansas City and Northern Railway Company* (74 Mo. 147), 41 Am. Rep. 305.

——. Owing to the defendant's negligence, its sleeping-car on which a woman was a passenger, caught fire, and she was compelled to leave the car half clad and took cold, which resulted in suppression of her menses and a long illness. It being shown that she was menstruating at the time of the accident, and that the illness was traceable to that condition, *held*, that the defendant was not liable in damages therefor. *Pullman Palace Car Co.* v. *Barker* (4 Col. 344), 34 Am. Rep. 89.

——. Where a railway company carried a passenger past his destination, and put him off at a water tank, in inclement weather and he contracted pneumonia in consequence of the exposure, *held*, that the pain, expense and business detriment resulting therefrom were proper items of damage. *International, etc., R. Co.* v. *Terry* (62 Tex. 380), 50 Am. Rep. 529.

Civil damage act — injury to third person. Under a statute, giving to any one injured in his person, property or means of support by any intoxicated persons a cause of action against the person causing the intoxication, an action lies for direct injuries done by the intoxicated person, as well as for damage arising from the intoxication. So where an intoxicated person, in flourishing a pistol, shot and wounded another, the latter was held to have a cause of action against the persons causing the intoxication by selling spirituous liquors to the person doing the injury. *King* v. *Haley* (86 Ill. 106), 29 Am. Rep. 14.

—— **threatening language.** In an action by a wife for damages against the seller of intoxicating liquors to her husband, threatening language and vulgar conduct by the husband to the wife not impairing her health, are no ground of recovery. *Calloway* v. *Laydon* (47 Iowa, 456), 29 Am. Rep. 489.

——**mental distress.** In an action by a wife against one who has sold intoxicating liquors to her husband, to recover damages for consequent injury to her means of support, her anxiety, mortification, sorrow and loss of her husband's society, cannot form an item of damage. *Koerner* v. *Oberly* (56 Ind. 284), 26 Am. Rep. 34.

—— **death.** In an action under the Civil Damage Act, for injury to the wife's means of support, a recovery may be had for the husband's death. *Mead* v. *Stratton* (87 N. Y. 493), 41 Am. Rep. 386.

——. In an action under the Civil Damage Act for injury to means of support in consequence of intoxication, a recovery may be had where the intoxication caused the death of the intoxicated person. *Roose* v. *Perkins* (9 Neb. 304), 31 Am. Rep. 409.

——. An intoxicated person going home at night had to cross a railroad. Next morning he was found on the track killed by being run over by the cars. *Held*, that the intoxication was the proximate cause of his death, and the seller of the liquor which intoxicated him, and the owner of the premises where it was sold, were liable, under the Civil Damage Act to his widow for injury to her means of support. *Schroeder* v. *Crawford* (94 Ill. 357), 34 Am. Rep. 236.

——. Under the Civil Damage Act a wife cannot maintain an action for the death of her husband, caused by intoxicating liquor sold him by defendant. *Barrett* v. *Dolan* (130 Mass. 366), 39 Am. Rep. 456.

——. In an action under the Civil Damage Act for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death cannot be recovered. *Davis* v. *Justice* (31 Ohio St. 359), 27 Am. Rep. 514.

——. In such action damages resulting from the death cannot be recovered of such person by such intoxication. *Kirchner* v. *Myers* (35 Ohio St. 85), 35 Am. Rep. 598.

—— **murder and suicide.** The father of minor the plaintiff, while intoxicated by liquor sold him by the defendant, murdered the plaintiff's mother and

committed suicide. The plaintiff was dependent on his father for support. *Held*, that the defendant was liable under the Civil Damage Act. *Neu* v. *McKechnie* (95 N. Y. 632), 47 Am. Rep. 89.

——**death caused by third party.** A statute gave a wife "who shall be injured in person, property or means of support," "in consequence of the intoxication * * * of any person," a right of action against the person who caused the intoxication, and made such person liable "for all damages sustained and for exemplary damages." *Held*, that the seller of intoxicating liquor to a husband who becomes intoxicated thereby, and in consequence of his abusive language is killed by a third party, is not liable in damages to the wife for the death. *Shugart* v. *Egan* (83 Ill. 56), 25 Am. Rep. 359.

—— **surgical operation.** In an action by a wife under the Civil Damage Act, it appeared that the defendant sold liquor to plaintiff's husband, whereby he became intoxicated, got in an affray and was wounded; that by reason of the husband's reckless disregard of the surgeon's direction, the wound became so dangerous as to lead the surgeon to amputate the leg, whereupon the husband died. *Held*, (1) that if the death was occasioned by the disregard of the surgeon's directions the defendant was not liable; (2) that if the amputation was in fact unnecessary, and was the immediate cause of death, the defendant was not liable, although the surgeon acted in good faith and with ordinary skill. *Schmidt* v. *Mitchell* (84 Ill. 195), 25 Am. Rep. 446.

Profits. On breach of contract for building a flume there can be no recovery for loss of profits of a mill which the other party was thus prevented from erecting. *Bridges* v. *Lanham* (14 Neb. 369), 45 Am. Rep. 121.

——. The defendant falsely and fraudulently represented to the plaintiff that a certain manufacturing firm, residing in another State, was solvent, and that their removal to the town where the plaintiff and defendant lived, and the setting up their business there, would largely increase its population and enhance the value of the plaintiff's property there. The plaintiff, relying on said representations, at the defendant's request paid a subscription to a fund to induce the firm to make such removal. They removed and set up business accordingly, but owing to their insolvency, none of the anticipated advantages accrued. *Held*, that an action for damages on account of said representation would not lie, the benefits expected being purely speculative. *Fitzsimmons* v. *Chapman* (37 Mich. 139), 26 Am. Rep. 508.

——. In an action of damages for personal injuries incapacitating the plaintiff from attending to his business as a manufacturer, evidence of the average profits of such business is incompetent. *Bierbach* v. *Goodyear Rubber Company* (54 Wis. 208), 41 Am. Rep. 19.

——. On a claim of damage for failure properly to adjust a raker to a reaping machine, according to contract, damages for loss of part of the crop thereby are not recoverable. *Fuller* v. *Curtis* (100 Ind. 237), 50 Am. Rep. 786.

Surgeon — negligence of. Plaintiff's intestate, by reason of defendant's negligence, received an injury which, without surgical treatment, would have caused death. He employed a competent and skillful surgeon, who, in performing the operation, made a mistake sufficient of itself to cause death. *Held*,

that the defendant was liable. *Sauter* v. *New York Central, etc., R. Co.* (66 N. Y. 50), 23 Am. Rep. 18, and note, 21.

——. Where one has been injured by the negligence of another, and uses ordinary care in endeavoring to be healed, and in selecting and employing nurses and surgeons, but owing to the negligence or unskilfulness of the latter the injury is increased, the party causing the original injury will also be responsible for the latter. *Pullman Palace Car Company* v. *Bluhm* (109 Ill. 20), 50 Am. Rep. 601.

See *Loeser* v. *Humphrey, post.*

MISCELLANEOUS.

Bridge. Plaintiff was driving a horse and gig over a defective town bridge, when the horse broke through and fell. Immediately thereupon plaintiff undertook to extricate the horse, and while doing so, was injured by the horse. *Held*, that the defect in the bridge was the proximate cause of the injury, and the town was liable therefor. *Page* v. *Bucksport* (64 Me. 51), 18 Am. Rep. 289.

Canal. When a public ship canal is of such a character as to require tugs to propel vessels through it, the wrongful refusal of the owners of the canal to admit a tug, whereby injury results to the owner of a vessel, is such a proximate cause of damage as will justify a recovery by the owner of the vessel. *Buffalo Bayou Ship Canal Company* v. *Dow* (63 Tex. 492), 668.

Causing horses to run away. The defendant intentionally directed a stream of water from a hose against a team of horses fastened to a post in the street in front of his premises. The horses, frightened thereby, broke loose, ran away, and collided with the plaintiff's team. *Held*, that defendant was liable for the injury to the latter. *Forney* v. *Geldmacher* (75 Mo. 113), 42 Am. Rep. 388.

Fatal injury — independent disease. In an action for a naturally fatal injury by negligence, the defense that the sufferer died from independent disease is not made out unless it is clearly shown that death must have ensued independent of the injury. *Beauchamp* v. *Saginaw Mining Company* (50 Mich. 163), 45 Am. Rep. 30.

——. Where one is injured by the negligence of another, and the injury renders the system more susceptible to disease and less able to resist it, and death results from such disease, the death is legally attributable to such negligence. *Terre Haute & Indianapolis Railroad Company* v. *Buck* (96 Ind. 346), 49 Am. Rep. 168.

——. Where personal injuries proximately arise from another's negligence, the wrong-doer is liable for the actual damage although it may have been enhanced by a predisposition to disease on the part of the injured person. *McNamara* v. *Village of Clintonville*, (62 Wis. 207), 51 Am. Rep. 722.

Fire — obstructions to firemen. Plaintiff owned houses which were separated from a river by a street only. Defendant, a railroad company, filled up a part of the river in front of these houses and occupied the same and a part of the street with tracks and buildings. Plaintiff's houses took fire and were destroyed, because the firemen were unable to reach and

procure water from the river, by reason of such obstructions caused by defendant. *Held*, that defendant's acts were not the proximate cause of plaintiff's loss, and that defendant was not liable even though his acts were unlawful. *Bosch* v. *Burlington & Missouri R. Co.* (44 Iowa, 402), 24 Am. Rep. 754.

——. In order to extinguish a fire in plaintiff's building it was necessary to, and firemen did, lay a hose across defendant's railroad. Defendant's servants, with notice of the presence of the hose, and although having time to stop the train until the hose could be uncoupled, ran a train over and severed the hose, thereby cutting off the water from the fire which otherwise might and probably would have been extinguished, and the building was consumed. *Held*, that the hose was lawfully laid across the track, and that the act of the defendants' servants was the proximate cause of the destruction of the building, and that the defendants were liable. *Metallic Compression Casting Co.* v. *Fitchburg R. Co.* (109 Mass. 277), 12 Am. Rep. 689.

Malicious injury to business. A declaration stated that the defendant privily loosened the nails from the shoe of a horse which he had shod, with intent to induce the owner to believe that the plaintiff had done the work badly, and to injure him in his trade of blacksmith, whereby the plaintiff lost the custom of the owner. *Held*, to show a cause of action. *Hughes* v. *McDonough* (14 Vroom, 459), 39 Am. Rep. 603.

Railway — accident — expulsion. A passenger on a railway train, being directed to change cars at a way-station, entered another car, but was ordered out by an employee as the train was not ready. He stood a short time on the platform of the car, and then stepped to a neighboring track and while waiting there was there injured by another train. *Held*, that this expulsion was not the proximate cause of the injury. *Henry* v. *St. Louis, Kansas City & Northern Railway Company* (76 Mo. 288), 43 Am. Rep. 762.

— running behind time. A railroad train, running three-quarters of an hour behind time, was upset by a gust of wind and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. *Held*, that the negligence of the company in running behind time was not the proximate cause of the injury, and that it was not liable therefor. *McClary* v. *Sioux City, etc., Ry. Co.* (3 Neb. 44), 19 Am. Rep. 631.

— train across highway. The defendant left a train of cars standing entirely across a highway crossing near its station, and the plaintiff, desiring to reach the station, undertook to drive with a horse and cart at a point where there was no crossing and the track was raised above the ground, and he was thrown off by the jostling of the cart and injured. *Held*, that the injury was not the proximate result of the defendant's conduct. *Jackson* v. *Nashville, Chattanooga and St. Louis Railway* (18 Lea, 491), 49 Am. Rep. 668.

— defective machinery. A brake on a railway car being so worn that it would not remain wound up, a sudden increase of speed of the engine caused it to give way, and the train broke apart. *Held*, that the defective brake was the proximate cause. *Ransier* v. *Minneapolis, etc., R. Co.*, 32 Minn. 331.

Sale of dangerous article to minor. Two boys, one aged ten and the other

twelve years, purchased of a dealer cartridges for use in a toy pistol, and were instructed by the dealer how to use them. It was against the statute to sell pistol cartridges to minors. The dealer knew of the dangerous character of the articles, and that the boys were unfit to be intrusted with them. Another boy six years old shortly afterward picked up a toy pistol containing one of the cartridges and discharged it, killing one of the boys who bought the cartridges. *Held*, that the dealer was liable for the death of the boy killed. *Binford* v. *Johnston* (82 Ind. 426), 42 Am. Rep. 508.

—— **of intoxicants.** The defendant, an unlicensed liquor seller, on Sunday, in violation of the statute furnished D. intoxicating liquor to drink, upon which D. became intoxicated and unconscious. The defendant put D. in this condition into his vehicle, drawn by a gentle horse which he had borrowed of the plaintiff; and by reason of his intoxication and inability to manage the horse, it ran away and was killed. *Held*, that an action would lie for its value. *Dunlap* v. *Wagner* (85 Ind. 529), 44 Am. Rep. 42.

Streets — drawing crowd in. Defendant mounted a pile of stones in the street to make a speech; a crowd of persons gathered about him, some of whom also got upon the stones and broke them. In an action by the owner of the stones, *held*, that whether defendant's act was the proximate cause of the injury was a question for the jury. *Fairbanks* v. *Kerr* (70 Penn. St. 86), 10 Am. Rep. 664.

—— **dangerous substance in.** Defendant left an open barrel of fish brine in a city street. Another person without his knowledge or authority emptied the barrel into the street. The plaintiff's cow, lawfully running at large in the street, drank the brine and was killed in consequence. *Held*, that defendant was liable. *Heney* v. *Dennis* (93 Ind. 452), 47 Am. Rep. 378.

——. The plaintiff's horses, being frightened by a steam engine placed in a public street by the defendant, ran away. Their fright was increased by the jolting of the wagon over a foot-crossing and the consequent rattling of the staves with which the wagon was loaded. The plaintiff jumped from the wagon and was hurt. He might have avoided the engine, but he apprehended no danger. The horses had previously ran away. The engine was likely to frighten a steady horse. *Held*, that the plaintiff might recover. *Turner* v. *Buchanan* (82 Ind. 147), 42 Am. Rep. 485.

——. Where a child fell into an excavation negligently left open on a public sidewalk, and was hurt by striking upon broken glass at the bottom, *held*, that the defect in the sidewalk was the proximate cause of injury. *City of Galveston* v. *Posnainsky* (62 Tex. 118), 50 Am. Rep. 517.

—— **defect — runaway horse.** The plaintiff's horse took fright, turned over his buggy, and threw it down the embankment of the street upon which he was driving, and thus he was injured. *Held*, that if the city was negligent in constructing the embankment, in not providing it with necessary railing or other means of protection, and in not keeping the street in safe condition, and such negligence was the real cause of the injury (the jury being the judge of these matters as questions of fact), the plaintiff had a cause of action. *City of Atlanta* v. *Wilson* (59 Ga. 544), 27 Am. Rep. 396.

——. A municipal corporation, leaving a dangerous and unfenced excavation in a public street, is liable to the owner of a horse, carefully driven upon the street, which taking fright runs away, falls into the excavation, and is killed. *City of Crawfordsville* v. *Smith* (79 Ind. 308), 41 Am. Rep. 612.

——. A. was injured by a horse driven by B., on a highway, and frightened by the overturn of a sleigh by a heap of snow and ice wrongfully made on the highway by C. *Held*, that A. could maintain an action against C. therefor. *Lee* v. *Union Railroad Company* (12 R. I. 333), 34 Am. Rep. 668.

——. A town is not liable for damages sustained by a traveller from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way, the combined action of both causes operating to produce the accident. *Perkins* v. *Inhabitants of Fayette* (68 Me. 152), 28 Am. Rep. 84.

——. Where a horse is frightened by a moving street car and runs away, and the driver is injured by collision with a dangerous obstruction in the street, the obstruction is the proximate cause. *Campbell* v. *City of Stillwater* (32 Minn. 308), 50 Am. Rep, 567.

Wharf — fright of horse contributing. Where the plaintiff backed his cart on a public wharf, for the purpose of loading, and the horse became suddenly unmanageable, and owing to the absence of a string piece, backed into the river and was lost, *held*, that the absence of the string piece was the proximate cause of loss. *Kennedy* v. *Mayor* (73 N. Y. 365), 29 Am. Rep. 169.

See *Lowery* v. *Manhattan Ry. Co.*, *ante*, 12.

In *Sellick* v. *Lake Shore, etc., R. Co.*, Michigan Supreme Court, September, 1885, the plaintiff, who was engaged in carrying passengers from a hotel to defendant's depot, was compelled to stop and wait for a freight train which obstructed the street for more than five minutes, in violation of the statute neglecting to move on or divide and let him pass, when a passenger train came by, and the blowing of the steam and noise of the cars frightened his horses and they ran away, and he was severely injured. *Held*, that no negligence being shown in the management of the passenger train, he could not recover, as the statutory negligence in allowing the freight train to obstruct the street was not the proximate cause of the injury. The court said: "The plaintiff had not, by his declaration, attributed his injury to the illegal detention, and if he had it would have been idle; for the particular injury of which he complained, namely, the fright and running away of his horses, could not have flowed from that detention as a proximate cause. The discussion of the question of proximate cause by this court in *Lewis* v. *Ry. Co.*, 54 Mich. 128, is so recent and was so full that further discussion now could do little more than to go over the same ground, and is therefore quite unnecessary. But the recent cases of *Jackson* v. *Ry Co.*, 13 Lea, 491; s. c., 49 Am. Rep. 663; and *Pittsburg, etc., R. Co.* v. *Staley*, to appear in 41 Ohio St. 118; s. c., 52 Am. Rep., are referred to as cases analogous to the present in their facts, and in both of which a conclusion was reached in harmony with the views here expressed."

In *Aldrich* v. *Gorham*, 77 Me. 288, the court said: "It is undoubtedly the law of this State, as settled in a line of decisions from *Moore* v. *Abbot*, 32 Me. 46, to the present time, that in order to render a town or city liable on account of an accident happening on a highway, it must appear that the defect in the way was the sole cause of the injury. If any other efficient, independent

cause, for which the town is not responsible, contributes directly to produce such injury, the town or city is not liable. Some portion of the harness, or carriage, may be defective and unsafe, and the accident may be the combined result of the defect in the harness or carriage, and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not rendered liable. The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks away from his driver and escapes from all control, while travelling on the way, and afterward, while thus free from the management and control of the driver, meets with an injury through a defect in the way. *Davis* v. *Dudley*, 4 Allen, 557; *Moulton* v. *Sanford*, 51 Me. 127. Where such is the fact it cannot be said that the defect in the way is the sole cause of the injury. There are other efficient, co-operating causes which combine to produce the accident, and which may be regarded as much the true and real cause of the accident as the defect in the way.

"But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. 'Every thing which induces or influences an accident,' says Chief Justice PETERS, in the very recent case of *Spaulding* v. *Winslow*, 74 Me. 534, 'does not necessarily and legally cause it.' And not only is it the doctrine of the court in our own State, but also in Massachusetts, that if a horse well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled; and that if while thus momentarily swerving or shying he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of agencies or mediums through which it was produced, and a recovery may be had for such injury. This doctrine is not at variance with that laid down in *Moulton* v. *Sanford*, 51 Me. 127, or *Perkins* v. *Fayette*, 68 Me. 152; s. c., 28 Am. Rep. 84, in both of which there were two independent, efficient, proximate causes of the accident; and it is in harmony with that of *Spaulding* v. *Winslow*, *supra*, and with the decisions of the Massachusetts court. *Titus* v. *Northbridge*, 97 Mass. 258; *Stone* v. *Hubbardston*, 100 Mass. 55; *Bemis* v. *Arlington*, 114 Mass. 508 *Wright* v. *Templeton*, 132 Mass. 50."

STATE v. MARTIN.

(14 Lea, 92.)

Landlord and tenant — assignment of lease — covenants.

The assignee of a lease is subject to a covenant therein to pay taxes, and a subsequent assignment by him will not relieve him from liability for a breach occurring during his possession.

BILL to recover taxes. The opinion states the case. The plaintiff had judgment below.

Champion & Head and *John Ruhm*, for complainants.

Stokes & Stokes, for defendants.

COOPER, J. Bill by the State, the county of Davidson and the city of Nashville to recover the taxes for the year 1880, levied upon an improved lot in Nashville, on the corner of the Public Square and College Street. The liability of the property for the taxes is conceded, and the only contest is between the defendants as to which of them shall be held primarily liable. The chancellor held that the defendant, A. B. Martin, as executor of the last will of R. L. Caruthers, deceased, was first liable, and he appealed.

On August 14, 1859, Frank McGavock leased the lot in question for the period of fifty years, to A. H. Hicks, his personal representatives and assigns, upon an annual ground-rent and the payment of all taxes, etc., which might be assessed or imposed by authority of the State, county, corporation of Nashville or otherwise. On February 19, 1876, A. H. Hicks conveyed to R. L. Caruthers, Jr., in trust to secure a large debt due to R. L. Caruthers, Sr., defendant Martin's testator, with power of sale on default of payment of the debt or any installment of interest, all his "right, title and interest" in the lot in question, with the improvements thereon, the lot "being the same leased by me from Francis McGavock on the 14th May, 1859, for the period of fifty years, by a lease recorded in register's office of Davidson county, book 29, p. 299, to which reference is here made." On November 8, 1877, R. L. Caruthers, Jr., by virtue of the powers conferred upon him by the foregoing deed,

sold and conveyed to R. L. Caruthers, Sr., "his heirs and assigns forever," all the right and title to the land and improvements vested in him by the trust deed. R. L. Caruthers, Sr., went into possession of the premises, under this conveyance, and remained in possession, receiving the rents and profits, until November 10, 1880, when he assigned his interest to one Shields. Caruthers paid the taxes during his possession up to the year 1880. Since his assignment to Shields, the heirs or devisees of McGavock, who were the other defendants to the bill, have terminated the lease by re-entry on the premises for the failure of Shields to comply with its covenants.

A lessee of land, during his occupation, holds both by privity of estate and of contract. His privity of estate depends upon and is co-existent with the continuance of his term. By an assignment, he divests himself of this privity and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the land may pass, and the assignee always holds in privity of estate with the original landlord. The assignee takes all the interest of the assignor in the thing assigned, but he takes it subject to all the covenants which are annexed to the estate and run with the land, and must perform them so long as he is in possession. For when a covenant relates to, or is to operate upon a thing in being, parcel of the demise, that which is to be done by force of the covenant is as it were, annexed to the thing demised, and goes with the land, binding the assignee to performance, though not named, and *a fortiori*, if named, and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land. *Bedford* v. *Terhune*, 30 N. Y. 458; Taylor Land. & Ten., §§ 436, 437, and cases cited. These covenants, as this court has said, are such as "touch and concern" the thing demised. *Brooks* v. *Smith*, Thomp. Cas. 236. And all the authorities agree that among the covenants to which the liability of an assignee extends are the covenants to pay rent, taxes and assessments. 1 Wash. Real Prop. 435 (3d ed.); Taylor Land. & Ten., § 437, and cases cited; *Dean of Windsor's* case, 5 Rep. 24; *Post* v. *Kearney*, 2 N. Y. 394. Although the assignee himself assigns over, he is notwithstanding liable for all such breaches as occurred during the time of his enjoyment, because the right of action having once vested for breaches committed by him, cannot be divested by a new assignment, although the privity of estate between the lessor and lessee or

assignee may be destroyed by the assignment, and a privity of contract never existed. Taylor Land. & Ten., § 449. A purchaser under a foreclosure of a mortgage or trust of the leasehold estate is an assignee of the lease, and liable accordingly during his possession of the demised premises. *Post* v. *Kearney*, 2 N. Y. 394. And the liability for the taxes of the year 1880 became fixed upon the 10th of January of that year.

The chancellor's decree was therefore correct in holding the estate of R. L. Caruthers, Sr., primarily liable for the taxes of 1880, as between him and the devisees or heirs of the landlord.

Decree affirmed with costs.

Decree affirmed.

Brown v. Brown.

(14 Lea, 253.)

Adverse possession — by devisees.

Devisees holding possession of land under a will duly proved and recorded, for the statutory period, will gain title although the will is afterward set aside; and the possession of a tenant for life inures to the benefit of the remainderman.*

BILL to recover property from devisees. The opinion states the case. The defendant had judgment below.

J. A. Warder and *H. L. Davidson*, for complainants.

Edmond Cooper, for defendants.

Cooper, J. Benjamin Brown died in 1857. An instrument in writing, purporting to be his will, was duly proved as such in common form by the persons named as executors therein, who qualified accordingly. The estate was settled by the executors, and the property turned over to the persons named as devisees and legatees after the payment of debts. The settlement was completed by the year 1860. In 1869, upon petition of parties interested, an issue

* See *Steele* v. *Renn* (50 Tex. 467), 32 Am. Rep. 605.

was made to contest the validity of the will upon the ground that the deceased was induced to execute it by the undue influence of his wife. Upon the trial the jury found that the execution was procured by the undue influence of the wife, and a judgment was rendered that the instrument was not the last will and testament of the deceased. The judgment was affirmed by this court in 1873. Shortly afterward R. S. Brown was appointed administrator of the decedent's estate. Thereupon he and some of the heirs and distributees of the deceased filed this bill against the other heirs and distributees, and the persons made devisees and legatees, under the supposed will, to recover the property, real and personal, received by the latter under the will. These parties plead and rely on the statute of limitations in bar of the action. The chancellor rendered a decree from which no appeal was taken. Two of the heirs and distributees have brought the case up by writ of error.

The heirs of the deceased, nothwithstanding the probate of the will in common form, might have sued at law for the land, and in that suit contested the validity of the will. *Weatherhead* v. *Sewell*, 9 Humph. 280; *Smith* v. *Neilson*, 13 Lea, 461. Having the right to sue and having failed to do so for more than seven years, during which time the defendants were in the continuous adverse possession of the land, the right of action would ordinarily be barred, and the title of the claimants be vested in the defendants. Code, § 2763.

Part of the realty was devised to the widow of the deceased for life with remainder in fee to other defendants. The contention is, as to that property, that the possession of the tenant for life would only inure to her benefit, not to the benefit of the remaindermen. But they all claim under the same instrument, which undertakes to convey the entire fee in the land, and the devise is an assurance of title purporting to convey an estate in fee within the meaning of the Code, section 2763. The interests of the tenant for life and in remainder constitute one estate, the two when added together, being equal to an estate in fee. "They are indeed different parts, but they constitute only one whole." 2 Bl. Com. 164. The possession under the section of the Code cited need not be by the owner of the fee in person. It may be by a tenant for life, for years, or at will. *Craddock* v. *Stalcup*, 1 Tenn. 351; *Ross* v. *Cobb*, 9 Yerg. 463. Or by an overseer or agent. *Jones* v. *Perry*, 10 Yerg. 59, 81; *Hammett* v. *Blount*, 1 Swan, 385; *Waddle* v *Stuart*, 4 Sneed, 535. And by successive tenants. *Sims* v. *Eastland*, 3

Head. 368. The possession of several successive privies in estate is good. *Marr* v. *Gilliam*, 1 Cold. 489. And the possession of one tenant in common will inure in favor of other tenants in common not in possession. *Hubbard* v. *Wood*, 1 Sneed, 279. A life tenant is a privy in estate with the remaindermen in fee, and represents the latter for all purposes touching the common estate. *Freeman* v. *Freeman*, 9 Heisk. 301; *Parker* v. *Peters*, 3 Leg. Rep. 12. His possession is necessarily the possession of those having the other interests carved out of the fee by the assurance of title under which he holds. And so this court has said: "That where a legacy is limited to several persons in succession, the executor's assent to the first taker will be considered an assent to those who are to succeed in remainder, because the several interests constitute but one entire estate. *Finch* v. *Rogers*, 11 Humph. 559, 564. If the law were otherwise, in the very common conveyance of land to a mother for life, and then to her children, the possession of the mother would only inure to her benefit, although her children might be living with her, for her possession would of course be exclusive during her life. Since the foregoing argument was written, the position contended for has been expressly held by the Supreme Court of Maryland in *Hanson* v. *Johnson*, 62 Md. 25; s. c., 50 Am. Rep. 199.

The case of *Stevens* v. *Bonar*, 9 Humph. 546, is not in conflict with this view. There the conveyance of the negroes was to a daughter of W. T. Richardson, "and her heirs forever," in trust for her mother, the wife of Richardson during her life, and then to go to the trustee and such other children the mother might bear. The conveyance was executed in North Carolina, and was by a statute of that State void for want of registration. The court was of opinion that the trusts of the deed were as absolutely void as if created by a parol gift, and said that the possession of the slaves by the father, if held in conformity with the deed, might vest, not a title in the mother, the life tenant, but "the absolute title" in the trustee. "It cannot be said," the court add, "that the possession of a party actually holding a slave is the possession of another person in remainder in whom no estate in remainder has been created." The decision turns upon the fact that the court treated the trusts as void, and fairly implies that if the remainder had been valid the possession might have inured to its benefit.

A remainderman is not bound by a judgment in ejectment against the tenant for life, neither is the owner of land by a judgment

against his tenant, and for the same reason the possession and title or interest of the defendant being alone involved.

The time of the bar of the recovery of personal property is three years, and of a money demand six years. These periods having elapsed before suit brought in the present case, the statute of limitations would *prima facie* be a good defense. The ground relied on to prevent the bar of the statute is, that there was no person to bring suit until the administrator was appointed after the will was set aside, and that the statute would not begin to run until there was a person capable of suing. The point is one of difficulty, on which there is a singular dearth of authority, although all which have been found, including one case of our own, are against the defense. The probate of a will of personalty, it seems to be now well settled, is conclusive, if the court had jurisdiction as to its testamentary character, the capacity of the testator, and as to all questions of fraud, imposition, and undue influence, until set aside in the mode prescribed by law. *Williams, Ex parte*, 1 Lea, 529; Code, §§ 2169, 2173; Williams Executors, 490; Jarman Wills, 27 (Big. ed.); *Clark* v. *Fisher*, 1 Paige, 176; 3 Redf. Wills, 57, 120. Like the adjudication of every other court of competent jurisdiction, the judgment would protect the purchasers of property under it, notwithstanding a subsequent reversal, unless the title can be impeached for fraud. The executor acting under it in good faith would be protected. It would seem to be equally clear that legatees under the will would acquire a good title at the time upon the assent of the executor to the legacy. The title would of course be under the will valid by virtue of the probate, and therefore not void, but voidable. The possession would be adverse to the personal representative of the deceased, who at the time had the right to the property, and who by virtue of that right had turned it over to the legatee. Such a possession continued for the length of time necessary to perfect the voidable title, with a personal representative of the estate then in existence, would according to all the analogies of the law be a bar to any subsequent representative. It was so expressly ruled by this court in *Rogers* v. *Winton*, 2 Humph. 178, a case in principle identical with the one before us. It was decided by one of our ablest judges. "If," he says, "the statute of limitations is a bar, it operated before the issue of *devisavit vel non* was found against the will, and rights acquired cannot be divested by subsequent matter." The will was set aside, but a good title had already been acquired under it. If a

person hold land for seven years under a fraudulent deed, would it be pretended that his title would be affected by a subsequent decree setting aside the deed for fraud? And how can an administrator impeach a title forfeited under a previous personal representative whose appointment and acts were legal? The cases of *Price* v. *Nesbit*, 1 Hill Ch. 445, and *Anderson* v. *Stewart*, 15 Texas, 285, tend to sustain our own case.

The effect of so holding will be to limit the time within which an issue of *devisavit vel non* could be brought with any expectation of benefit. But there should be, and is in most of the States, a short limitation for the bringing of such an action. No harm is done by decisions which bring about the same result. And if the issue be made within the period of limitation for the recovery of the property, the law's delay in that suit would not be allowed to prejudice the parties upon a bill filed promptly to prevent that result.

Decree affirmed.

FREEMAN, J., dissented.

THEILAN v. PORTER.

(14 Lea, 622.)

Constitutional law — abatement of nuisance.

The legislature may authorize the destruction of unhealthy houses as nuisances.

TRESPASS. The opinion states the case. The defendant had judgment below.

T. W. Brown, for Theilan.

C. W. Heiskell, for Taxing District.

DEADERICK, C. J. The plaintiff brought an action of trespass on April 27, 1880, against the taxing district of Shelby county and its legislative council and officers for damages for destroying his dwelling-house in Memphis.

About thirty pages of demurrers, pleas and demurrers, and replications thereto, resulted in issues upon the material questions arising in the cause upon the record.

The defendants justified the pulling down of the house under the acts of 1879, conferring the power to remove all buildings, etc., found to be unhealthy.

Allowing the objection by demurrer to defendants' pleas to have been improperly overruled, the objection was cured by pleas subsequently filed by leave, in which the justification is placed solely on the ground that the house was a nuisance because unhealthy, and not because of its dilapidation and danger on this account. So, as before stated, it is not necessary to follow and dispose of the various questions raised by demurrers, as the issue rests upon the right of defendants to do the act complained of, and this they rely upon by their plea of justification, which their amended or additional pleas fully and formally set up. The Circuit judge, who tried the case without a jury, does not recite the facts upon which he rendered his judgment, but recites in his judgment that "having heard the evidence the court finds for the defendants," etc., and renders judgment against plaintiff for costs, etc.

The plaintiff appealed, and the referees have recommended an affirmance of the judgment, and plaintiff has excepted to their report, and his exceptions go to the error in overruling his demurrer to the first batch of pleas, and in failing to sustain it, to the additional pleas, and to the right of the legislature to authorize the acts complained of to be done, and to the failure of the referees to report the facts.

The most material exception is that which denies the power of the legislature to authorize the taxing district to do the act complained of. The authority claimed is found in two acts of the legislature, one passed January 29, 1879, entitled, "A bill to establish taxing districts in this State, and to provide the means of local government for the same": Acts of 1879, p. 15; and an amendment thereto passed March 12, 1879: Acts of 1879, p. 98. Both acts have this provision: The city government "shall have power, and it shall be their duty to condemn as nuisances all buildings, cisterns, wells, privies and other erections in the taxing district, which on inspection, shall be found to be unhealthy, and cause the same to be abated, unless the owners thereof, at their own expense, upon notice, shall reconstruct the same in such man-

ner as shall be prescribed by the laws of the taxing district." They are also required to have buildings, etc., so constructed in future as not to interfere with the health of the citizens; and other powers are given and duties imposed in respect to the cleanly and healthy condition of the houses, etc., of the city.

In the bill of exceptions it is recited that on the trial there was evidence on behalf of plaintiff tending to prove that the destruction and removal of the house was attended with great oppression to him personally, and with unnecessary loss of his property, and that the house had been the home of the plaintiff for many years before the taxing district was created, and on behalf of the defendants evidence was introduced tending to prove that said house was unsafe by reason of its rotten and tumble-down condition, and unsanitary by reason of its filthiness and its rotten condition, and was for both of these reasons a nuisance, and that no unnecessary force or oppression was used to accomplish its destruction, etc., and that defendants pursued the district law in its condemnation and destruction, and that defendants were the officers of the taxing district, intrusted with the duties imposed by said statutes.

It is also recited in said bill of exceptions, that the court found that defendants did destroy said house, or cause it to be destroyed and removed with no more force than was necessary, and that it was not oppressively, but carefully done without loss or unnecessary injury to its contents; that said house was unsanitary and unsafe to a degree that made it a nuisance, and that defendants were protected under the acts of 1879, above referred to, and acted in discharge of their duties as public officers.

It is argued that the acts in question are in violation of that clause in our State Constitution which declares that no man's property shall be taken or applied to public use without the consent of his representatives, or without just compensation being made therefor.

But this inhibition has no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. Sedg. Const. Law, 434–5, and in a note on pages 435–6, it is said: "In very many instances summary proceedings without the usual forms of a regular judicial trial, have been held valid as falling within the police powers of the State," because the

necessities of society and good government demand a certain amount of summary and repressive measures which would be ineffectual if delayed by ordinary machinery of more regular judicial trial, and numerous examples and cases are given in which such summary proceedings were held valid, and it is added, abating a nuisance does not take away property without due process of law, for the common law recognized the power to abate a nuisance in a summary manner.

Chief Justice SHAW said: "Every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to others, nor to the rights of the community. If it be hurtful he is restrained, not because the public makes any use of it, or takes any benefit or profit from it, but because his own use would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non lædas.* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner." Sedg. Stat. & Const. Law, 438–9, citing 7 Cush. 53. So that the summary abatement of a nuisance is not in violation of the Constitution, as taking private property for public use without compensation, or depriving one of his property without giving him his day in court.

[Minor points omitted.]

Where the legislature in terms confers on a municipal corporation power to pass ordinances of a specified or defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed in pursuance thereof cannot be impeached as unconstitutional, because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. 1 Dill. Mun. Corp., § 262. And where the power is given, the ordinance must conform to it.

The statutes cited conferred the power, upon inspection, if unhealthy, to condemn, and upon notice given, if the nuisance was not abated by the owner, the municipal government were directed to cause the same to be abated. Under ordinances in conformity to the acts of the legislature the nuisance was abated.

The case in 10 Wall. 506, is not in conflict with the cases cited. It is there said, the mere declaration of the city council that a certain structure was a nuisance did not make it so, unless it in fact had that character. It, says the court, is a doctrine not to be tolerated, that a municipal corporation, without any general laws

by the city or State, within which the structure can be shown to be a nuisance, can by its mere declaration that it is one, proceed to abate it. That is the point of that decision, and the court held that the structure in fact was not a nuisance.

From the view we have taken of this case we think the referees are correct in this conclusion, as a reversal on this ground would be of no practical benefit to complainant.

We concur with them therefore in this particular, as well as in their recommendation of affirmance of the judgment, and confirm their report.

Judgment affirmed.

DAVIS v. CROSS.

(14 Lea, 657.)

Deed — delivery.

A deed of gift of real and personal property contained this clause: "This deed will be delivered to a friend for safe keeping, with directions to deliver at such time as I may direct." The directions accompanying it instructed the receiver to deliver it to the county recorder for registration on the grantor's death. *Held*, subordinate to a deed of gift delivered to other grantees, and accompanied by possession, although not recorded until after the former.

EJECTMENT. The opinion states the case. The defendant had judgment below.

Weatherford & Estes, for complainants.

C. W. Frazer, for defendant.

COOPER, J. Ejectment bill, both parties claiming under deeds of gift executed by the same person. The chancellor decreed in favor of the complainants, while the referees have reported in favor of the defendant. The complainants alone except to the report.

The contest, as it comes before us on the exceptions, is one of title, the point being whether there was a valid delivery to the defendant of the deed under which he claims. That deed is dated November 5, 1874, was acknowledged on the same day by the grantor

before the clerk of the County Court as well as attested by witnesses, and was noted for registration on September 13, 1880, the day after the grantor's death. The deed to the complainants is for about twenty-nine acres, part of the land described in the defendant's deed, bears date May 2, 1879, was acknowledged by the grantor on the 20th of the same month, and was noted for registration on the day after the grantor's death, but several hours subsequent to the noting of the defendant's deed. The title of the defendant is law therefore, if good by delivery before registration, older than the title of the complainants, and first registered.

M. S. Brooks, the common grantor, was an old man, and resided on the farm described in the deed to the defendant at the date of that instrument, and continued to live there until his death. The defendant was a nephew of the grantor, and living with him when the deed was signed, but shortly afterward left him, removing to Massachusetts. The complainants were the children of a negro foreman or manager of the grantor's farm for several years, who died in 1877. The grantor surrendered to the complainants the possession of the land conveyed to them after the execution of the deed, and it was rented out for them by the eldest of the children for the year 1880. The deed was delivered to the eldest of the children, then about seventeen years of age. The defendant obtained possession of this land, after the death of the grantor, by collusion with the tenant.

The deed to the defendant purports to convey to him the whole of the testator's farm, consisting of 150 acres, "together with all and singular the household and kitchen furniture, pictures, paintings, growing crops, tools and farming utensils of every description, eight mules, three horses, twelve cows and calves, and the stock of hogs and sheep on said place." It is, in form, an absolute conveyance, without any reservation in favor of the grantor, but contains at the end the following clause: "This deed will be delivered to a friend for safe-keeping, with directions to deliver at such time as I may direct." It contains therefore positive evidence on its face that it was not intended to be delivered to the grantee at that time. It was in fact delivered to A. G. Dennis, one of the attesting witnesses, he thinks by the defendant, inclosed in a sealed envelope, with the following indorsement written by the defendant, but signed by the grantor: "H. Clay Cross — private papers. A. G. Dennis is alone desired to open this package immediately after

my death, and examine papers, and where records of them have not been made, for A. G. Dennis to immediately deliver them to recorder of Shelby county for record. M. S. Brooks." The deposition of Dennis is taken, and he says: "I think Mr. Brooks or some one else told me that he intended to have put the deed to record himself, but had been advised that inasmuch as he intended the place as a permanent and final home for himself, he ought to retain the deed or title as long as he lived, and had in this view given the direction on the back of the envelope." The lawyer who drew the deed at the instance of Mr. Brooks testifies that the intention of the grantor was to register at once, but that this intention was abandoned at his, the lawyer's suggestion, whereupon the clause quoted above was added to the deed. Dennis testifies further, that some months, possibly a year, before the grantor died, he called upon him for the package inclosing the deed, together with some scrip of his which the witness had, and the witness delivered it and the scrip to him. After the grantor's death, witness went to his house and took possession of his papers, and among other things of the deed to the defendant, which he found in a locked closet up stairs, inclosed in the same envelope, and sealed up as when first delivered to him. The witness took the deed to the register's office, and caused it to be registered.

The deed, as we have seen, shows upon its face that it was not intended to be delivered at the time of its acknowledgment. But it also shows that it was to be delivered to a friend with directions to deliver it to the grantee at such time as the grantor "may direct." And the proof shows that the deed was accordingly delivered to a friend with written directions to open the package "immediately after his death," and deliver the same for registration "immediately." The testimony leaves no doubt that the grantor considered he had done all that was necessary to perfect the deed as a gift except to register it, and that registration would complete the gift. He accordingly gave the necessary directions in writing. Although registration alone will not establish a delivery, yet registration with any act or declaration of the grantor, evidencing his intent that the instrument should then take effect as a deed, and that he had done all that he thought necessary for the purpose, would be sufficient: *Tompkins* v. *Bamberger*, 3 Lea, 579; *McEwen* v. *Troost*, 1 Sneed, 191. The fact that the grantor resumed possession of the deed, or even retained possession all the time, would not change the result if the

circumstances all indicate that the original intention continued. *Ledgerwood* v. *Gault*, 2 Lea, 648. And the keeping of the papers in the same sealed package, and with the original indorsement, would ordinarily establish a continuance of the intent.

The witness, Dennis, says in relation to his surrendering the deed to the grantor: "I did not feel quite right in giving it up to him, and told him he ought to stand up to Cross; he gave me some excuse, said he had a name wrong in another deed, and wanted to make some change some way." The grantor did, therefore, have a purpose in resuming the possession of the instrument and his direction on it. That purpose was, as the conveyance to the complainants plainly shows, to reduce the gift of land to the defendant by the amount deeded to the complainants. And the question is whether he has legally accomplished his purpose.

A delivery of a deed to the grantee is, of course, essential to perfect his title, and deprive the grantor of his interest in the property: *Brevard* v. *Neely*, 2 Sneed, 165. It is clear that Brooks, by the deed to the defendant, never did part with his title to either the real or personal property mentioned in that deed. The gift was not perfected by a change of possession of the property, or by a completed conveyance in lieu thereof. It was and could only be an executory contract, without consideration, until actual delivery.

It follows, necessarily, that he could, in the meantime, make a valid gift to a third person of any portion of the property; and that is what he did by the conveyance of part of the land to the complainants. The gift to the complainants having been perfected by delivery of the deed to them, and putting them in possession of the property, the subsequent delivery of his deed to the defendant could not effect that title, there being in fact no valid legal gift to the defendant until the registration of the defendant's deed, treated as a delivery. The witness, Dennis, admits that he saw the deed to the complainants before he registered the defendant's deed. And the possession of the complainants under their deed was notice to the defendant of their right. Under these circumstances the title of the complainants is the better title: Code, § 2030, sub-section 6; 2072, 2074, 2075; *Kirkpatrick* v. *Ward*, 5 Lea, 434; *Worley* v. *State*, 7 Lea, 395; *Mixon* v. *Sheppard*, 2 Humph. 335.

The exceptions to the report of the referees must be sustained, and the decree of the chancellor affirmed with costs.

Judgment affirmed.

CASES

IN THE

SUPREME COURT

OF

MISSISSIPPI.

SEMPLE v. VICKSBURG.

(62 Miss. 63.)

Municipal corporation — negligence — sewer.

A city ordered certain privy inlets connecting with a sewer to be closed on account of the stench. In doing this the workmen closed an inlet from the plaintiff's house, not connected with a privy, and caused the water to flow back on her premises. *Held*, that the city was liable.

ACTION for injury by flooding. The opinion states the case. The defendant had judgment below.

A. M. Lea, for appellant.

Birchett & Gilland, for appellees.

CHALMERS, J. Washington street in the city of Vicksburg was permeated throughout its length by a culvert or sewer, into which there ran various inlets from privies on the sides of the street, and also one or more inlets from private yards disconnected from the privies. The citizens being annoyed by the obnoxious stenches arising from the sewer, the board of mayor and aldermen, in 1879, passed the following ordinance:

"On motion, the chairman of the street committee is instructed to have all privy inlets to sewers hermetically sealed, also to ascer-

tain if traps can be made available for shutting out all odors emanating from the sewer."

Said chairman employed one Stanton to close said privy inlets. By the negligence or inattention of Stanton, he closed up the inlet running from Mrs. Semple's house to the sewer instead of that leading from her privy, in consequence of which the water leading from the house was dammed up and flooded, whereby her house was greatly damaged; for which injury she brings this suit.

The court below, on motion of defendant, excluded all the testimony, it being shown that Stanton afterward received payment from the city for the work done, though it was not shown that the city knew of his negligence and by its payment ratified it. The action of the court was based upon the idea that a municipal corporation is not liable, even for the negligence of its employees and servants, while engaged in a public work which the city performs for the public at large, and from which the corporation derives no pecuniary profit nor expects to do so. There are undoubtedly many cases holding this doctrine, which are noted and commented on in 2 Dillon on Municipal Corporations (3d edition), § 775 *et seq.*, and authorities cited.

We prefer not to involve ourselves in the mazes of these decisions, but rather to confine ourselves to the point before us.

It is quite universally held that a municipal corporation is liable for the acts of its workmen in the work of constructing gutters, drains and sewers, where those acts are purely ministerial, involving the exercise of no governmental powers or judicial functions. An almost unbroken array of authorities fixes the liability in cases like these. This principle seems decisive of the present case. The action of the mason here in closing up the inlets was purely mechanical, and the city in ordering it was exercising no governmental function whatever. The closing up of the inlet flowing from the house, instead of that flowing from the privy, proceeded clearly from forgetfulness or inattention, and to such an act the doctrine of *respondeat superior* must be applied. 2 Dill. Mun. Corp., § 1049 *et seq.; Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 483; s. c., 53 Am. Dec. 316; *Delmonico* v. *City of New York*, 1 Sandf. 222; *Barton* v. *Syracuse*, 6 N. Y. 54; *Kobs* v. *Minneapolis*, 22 Minn. 159; *Emery* v. *Lowell*, 104 Mass. 13; *City of Montgomery* v. *Taylor*, 33 Ala. 116; *City of MacGregor* v. *Boyle*, 34 Iowa, 268; Whart. Neg., § 262; 2 Thomp. Neg., § 742; Wood. Mast. and Serv. 915, 917.

LEINKAUF V. BRINKER.

(62 Miss. 255.)

Evidence — of good character.

In a civil action where a sale is attacked for fraud, evidence of the good character of the purchaser is incompetent.*

TRIAL of right to chattels. The opinion states the case. The defendant had judgment below.

Fred. & F. M. Beall, for appellants.

White & Fox, for appellee.

ARNOLD, J. Appellants commenced suit by attachment against T. C. Smith, a merchant of Clay county, and certain property consisting of a stock of goods levied on under the writ of attachment was claimed by J. R. Brinker, the appellee. His claim was based on a sale of the goods to him by Smith, alleged to have been made a few days before the attachment was levied. After judgment by default in the attachment against Smith there was a trial of the right of property on the issue joined between the plaintiffs in attachment and the claimant, which resulted in favor of the claimant. On the trial of this issue the sale of the property to claimant was assailed as fraudulent and void, and much testimony, mainly circumstantial, was heard on this point. Under these conditions the claimant offered and was permitted by the court to introduce testimony to show that his general character for honesty and fair dealing in the community in which he lived was good, to all of which appellants objected. The ruling of the court on this subject is assigned for error here, and it is the only assignment necessary to be noticed.

The authority relied on for the admission of the evidence as to the good character of the claimant is found in 1 Greenl. Ev., § 54, where after stating that in civil cases such evidence is not admitted unless the nature of the action involves the general character of the

*To same effect, *Simpson* v. *Westernberger* (28 Kans. 756), 42 Am. Rep. 195.

party or goes directly to affect it, this learned and excellent author adds, "and generally in actions of tort, whenever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it." *Ruan* v. *Perry*, 3 Caines, 120, is cited as authority to support this text. In that case the commander of a national frigate was sued in trespass for seizing and detaining plaintiff's vessel and taking her out of her course, by means whereof she was captured by an enemy. It became an important question in the trial to determine whether the defendant acted in honest obedience to his instructions from the navy department, or with a fraudulent intent and in collusion with the captors, as the plaintiff alleged and attempted to show by circumstances. To repel this imputation, the defendant was permitted to appeal to his good character. *Ruan* v. *Perry*, was recognized as authority in *Fowler* v. *Ætna Fire Ins. Co.*, 6 Cow. 675; s. c., 16 Am. Dec. 460, and afterward by Chancellor WALWORTH in *Townsend* v. *Graves*, 3 Paige, 455, 456, but it was positively condemned and overruled in *Gough* v. *St. John*, 16 Wend. 646. *Gough* v. *St. John* was an action on the case for a false and fraudulent representation as to the solvency of another. On this issue it was held that evidence of the general good character of the defendant for honesty and fair dealing was not admissible. *Ward* v. *Henderson*, 5 Port. 382, was a suit of the same nature in which the same conclusion was reached as to the admissibility of such evidence. *Woodruff* v. *Whittelsey*, 1 Kirby, 60, was trover for goods where fraud upon creditors by a colorable bill of sale was involved and the evidence circumstantial, but the general character of the parties to the bill for honesty was excluded. In *Anderson* v. *Long*, 10 S. & R. 55, the plaintiff was not allowed to show his general character for honesty, although the defense was that he had fraudulently obtained the bond upon which the suit was brought. In *Porter* v. *Seiler*, 23 Penn. St. 424; s. c., 62 Am. Dec. 341, evidence of the general good character of the defendant for peace and order was held to be inadmissible for the purpose of rebutting malice in an action of trespass for an injury inflicted by cutting with a knife. In this case the court observed that the passage from Greenleaf, which has been quoted, is not sustained by any authority except that of *Ruan* v. *Perry*, which they declined to follow, and the court said further, that putting character in issue in civil suits is a technical expression, which does not mean that the character may be affected by the

result, but that it is of particular importance in the suit itself, as the character of a plaintiff in an action of slander or that of a woman in an action for seduction. In *Gutzwiller* v. *Lackman*, 23 Mo. 168, plaintiff's deed was assailed as fraudulent and void on the ground that it had been made to hinder, delay, and defraud creditors, but he was not permitted to meet this phase of the case by the introduction of evidence as to his general good character for honesty. *Church* v. *Drummond*, 7 Ind. 17, was an attachment based on the charge that the defendant was about to sell, convey, or otherwise dispose of his property with intent to cheat and hinder his creditors. On the trial the defendant was permitted in the lower court to examine witnesses as to his general character for honesty, but the Supreme Court held it was error, and expressly repudiated the doctrine of Greenleaf, that when the defendant is charged with fraud from mere circumstances evidence of his good character is admissible to repel it. In *Smith* v. *Plunket*, 1 Strobh. 372, it was adjudged that the plaintiff in *assumpsit* should not have been permitted in the lower court to introduce testimony as to his general character for honesty where the defense charged him with fraud and dishonesty in the transaction on which the suit was brought. The court said that it is plain that in civil proceedings where the nature of the action itself does not involve the general character of the party, evidence as to that character cannot be offered to contradict an imputation of dishonesty or even of fraud. The transaction presented in any ordinary civil case must depend upon its circumstances, and not upon the character of the parties. In such case, no matter how serious a moral delinquency may be involved in a fact or how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous character to disprove the fact.

It appears from this examination that the particular part of the text of Greenleaf under consideration is not sustained by authority. The general rule, English and American, is that if the general conduct of a party to a civil suit is put in issue, then evidence of his general character, as distinguished from proof of particular acts is admissible, not to show that particular things were done or not done by the party, but that his general conduct was or was not as alleged. 1 Whart. Ev., §§ 47, 48; 1 Taylor Ev., § 355.

The judge whose ruling is brought in question by the appeal in this case, with better opportunities for investigation and reflection

than were afforded at the trial in the lower court, concurs with his associates here, that error was committed in admitting the testimony as to the claimant's character, for which the judgment must be reversed and the cause remanded for a new trial.

Judgment reversed.

MORING v. ABLES.

(63 Miss. 263.)

Ejectment — against lawful owner in forcible possession.

One who having been in unlawful possession of lands has been forcibly dispossessed by the true owner cannot maintain ejectment to regain possession.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

Golladay & Lester, for appellant.

A. H. Whitfield, for appellee.

COOPER, J. [Omitting a minor point.] Upon no matter that has fallen under our investigation is there a greater conflict of authorities than upon the question of the rights and remedies of an occupant who has been forcibly evicted by the owner having an undoubted right to make a peaceable entry. The courts in America occupy radically different positions on it, and there is no little conflict of judicial expression in England.

It is conceded by all, that after the entry into power of the Norman conquerors, a tenant under such circumstances had no civil remedy, and it is at least doubtful whether the owner was subject to indictment unless guilty of an actual breach of the peace in addition to the forcible entry. 1 Russ. Crimes, 420; *Rex* v. *Wilson*, 8 T. R. 364. But by 5 Rich. 2, ch. 8, it was declared that "none shall make entry into any lands and tenements but in case where entry is given by law, and in such case not with strong hand nor with multitude of people, but only in a peaceable and easy manner," on pain of imprisonment, etc.

* See *Souter* v. *Codman* (14 R. I. 119), 51 Am. Rep. 364, and note, 366.

Upon the change wrought by this statute the conflict of authority has arisen. By some courts it is held, that since the act of entering by force is made unlawful, no right can arise from it, that "a lawful possession cannot be acquired by an unlawful act," and therefore that the possession so acquired cannot be interposed by the owner in defense, in any character of action. The leading case announcing this view is *Dustin* v. *Cowdry*, 23 Vt. 631, in which Judge REDFIELD, in an ardent and exhaustive opinion, contends that this is the conclusion of the English courts. See also *Reedy* v. *Purdy*, 41 Ill. 279.

Another view, sustained probably by the weight of English authority, is that though the tenant may recover damages against the landlord for any trespass against his person or property committed in making the forcible entry or in evicting the tenant after such entry, yet he cannot recover for any damage done to the premises, since to an action of trespass *quare clausum* a plea of *liberum tenementum* could be successfully interposed by the owner, nor can he recover possession of the premises in any other manner than that provided by the statute against forcible entry and unlawful detainer. *Newton* v. *Harland*, 1 Man. & Gran. 644; *Pollen* v. *Brewer*, 97 E. C. L. R. (7 Com. Bench. N. S.) 371; *Beddall* v. *Maitland*, 17 Ch. Div. 174, and cases therein reviewed.

In America the weight of authority, says Mr. Washburn (1 Wash. Real Prop. 538), is to the effect that "if the owner of land wrongfully held by another enter and expel the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for injury to the occupant's goods, nor for assault and battery, although in order to effect such expulsion and removal it becomes necessary to use such force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry." The authorities cited by him profess, in the main, to be supported by the case of *Newton* v. *Harland;* but this case, according to the latest review of it by the English court which has fallen under our observation, decided "that there is a good cause of action whenever, in the course of a forcible entry, there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession." This is the language of FRY, Chancellor, in *Beddell* v. *Maitland.* Proceeding then to apply the principle to

the case before him, he continued: "I come therefore to the conclusion, that in respect of his claim for damages for the forcible entry and eviction, the defendant cannot succeed; but that in respect of his claim for damages done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed."

Dismissing from consideration all questions except that presented by this record, it appears that the courts of Vermont and Illinois stand alone in holding that a tenant who continues unlawfully in possession can, as against the owner who has made a forcible entry, recover damages in an action of trespass *quare clausum*, or the possession of the premises by ejectment. 1 Wash. Real Prop. 538, and authorities cited in note 3.

Aside from the decided weight of authority by which the opposite view is sustained, it is especially applicable in this State, since with us the action of ejectment is no longer a mere possessory action, but is one in which the title is tried, and a judgment in which would conclude not only the question of possession but also the right of title. Code of 1880, § 2513.

We are therefore of opinion that ejectment cannot be maintained by the plaintiff, but that to recover possession of the premises he must resort to the action of unlawful entry and detainer.

Judgment reversed.

BUCKINGHAM *v.* ELLIOTT.

(62 Miss. 296.)

Nuisance — invasion of well by roots.

Where the roots of a tree run into and pollute a well on the lands of an adjoining owner the latter may have an action for the damage, after refusal of the owner of the tree to abate the nuisance.*

ACTION for damage to a well. The head-note states the point. The defendant had judgment below.

G. C. Payne, for appellant.

Sykes & Bristow, for appellee.

*See *Hoffman* v. *Armstrong* (48 N. Y. 201), 8 Am. Rep. 537.

CAMPBELL, C. J. We are not able to draw a distinction between the roots of a tree which extend into a neighbor's land and overhanging branches. Undoubtedly if the branches of a noxious tree extend over the land of another and do injury the owner of the tree may be held responsible for the damage done. To this effect are all the authorities. In *Countryman* v. *Lighthill*, 24 Hun, 405, it is said: "The overhanging branches of a tree not poisonous or noxious in its nature are not a nuisance *per se* in such a sense as to sustain an action for damages." It was further said that the action was without precedent, and upon principle not to be sustained, because to constitute a cause of action for a nuisance, "there must be not merely a nominal but such a sensible and real damage as a sensible person, if subjected to it, would find injurious," etc. Said the court in that case: "It would be intolerable to give an action in the case of an innoxious tree whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor's soil. The neighbor has a remedy in such case by clipping the overhanging branches." The action was denied in that case as groundless and vexatious, because it did not appear that any sensible injury had been done by the overhanging branches, but it was not denied that an action could be sustained where a sensible injury had resulted. In *Hoffman* v. *Armstrong*, 46 Barb. 337, it was said: "If the branches of the tree which overhung the defendant's land were a nuisance, his remedy was an action for the damages." In Cooley on Torts, 567, it is said: "It is a nuisance if the branches of one's tree extend over the premises of another, and the latter may abate it by sawing them off. The same rule applies here as in trespass; the insignificance of the injury goes to the extent of the recovery, and not to the right of action."

It is laid down by Wood on Nuisances, § 112, that the person injured by overhanging branches may abate the nuisance by cutting them off, or may have his action for damages. Wherever one's rights are invaded he must have an action for redress, and "the insignificance of the injury goes to the extent of the recovery, and not to the right of action." This is the view of this court announced in *Henry* v. *Shephard*, 52 Miss. 135. Sections 2370 and 2376 of the Code are designed to afford protection against malicious and trivial actions.

It seems to be settled law that overhanging branches are a nui-

sance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover the damages sustained from them. The right of action seems clear.

In determining how much the person injured shall recover, it may be proper to consider the means of protection in his own hands against the injury complained of. It is an admitted fact in this case that the roots of the mulberry trees destroyed the well. That proves the noxious character of the trees. The trees were planted by a former owner, but the appellee has no right to maintain and continue a nuisance after notice of its character and the injury done by it. True, he has as much right to shade and ornamental trees as his neighbor has to his well of unpolluted water; but if in the enjoyment of his right he invades his neighbor's, he is answerable for it. The trees and their roots are his; he must so restrain his roots as not to work injury to his neighbor; he can enjoy the full advantage of his trees, as we suppose, without permitting them to damage his neighbor. He is not required to destroy them, but only to prevent them from encroaching injuriously upon others. This he is required to do upon the principle embodied in the fundamental maxim: "So use your own as not to hurt another."

Reversed and remanded.

WHEELESS v. WILLIAMS.

(62 Miss. 869.)

Negotiable instrument — "interest after maturity."

A promissory note payable on a certain day with "interest after maturity" draws interest from that day and not from the third day of grace.

ACTION on a promissory note. The opinion states the point. The defendant had judgment below.

J. McC. Martin, for appellant.

Stephen Thrasher, for appellees.

COOPER, J. On a note made payable on a certain day and bearing interest after maturity, interest begins to run on the day named, although for the purposes of suit the note does not mature until the expiration of the days of grace. *Weems* v. *Ventress*, 14 La. Ann. 267.

Judgment affirmed.

NEW ORLEANS, ETC., RAILROAD COMPANY v. NORWOOD.

(62 Miss. 565.)

Master and servant — engineer running train for contractor.

A railroad company let certain work to a contractor, furnishing him a construction train with an engineer to run it. Except in respect to speed and side-tracking for other trains, the train was under the control of the contractor. The company was bound to discharge the engineer on the contractor's complaint; otherwise the company controlled him; and it paid his wages, but deducted them from the amount due the contractor. *Held*, that the engineer was the servant of the company.*

ACTION for the value of a mule. The opinion states the case. The plaintiff had judgment below.

Miller, Smith & Hirsch, for appellant.

James Simrall, for appellee.

COOPER, J. The appellee's mule was killed by the negligent running of a train upon the defendant's road. The liability of the company turns upon the question whether the persons in charge of the train were the servants of the company or of one McDonald, an independent contractor who was engaged in widening a cut in defendant's road. By the contract between the company and McDonald, he was to be paid sixty cents per cubic yard for all earth removed from the cut, and in addition to this the company was to furnish him with a construction train and engineer to manage the same. This train was required by the defendant to be upon the side-track fifteen minutes before the schedule time of each one of its trains, and was prohibited by the defendant from running at any time at a greater rate of speed than thirteen miles per hour. No

*See *Joslin* v. *Grand Rapids Ice Co.* (50 Mich. 516), 45 Am. Rep. 54.

other regulations were prescribed by the company, and subject to these, the control, management and direction of the train was wholly with McDonald. The engineer was selected by the company, and it alone had the right to discharge him, and it paid him his wages which however were charged to McDonald and deducted from the sum due him under the contract. It was the duty of the company to discharge the engineer upon complaint made by McDonald and to supply his place with another, and since the killing of appellee's mule this has been done.

On these facts, which were agreed on in the court below we are of opinion that the judge correctly held that the engineer was the servant of the company.

Among the numerous tests which have been from time to time suggested for the determination of the question, whose servant is this, are the following, each of which has in some case been considered as conclusively fixing the existence of the relation:

(1) The right of selecting the servant; (2) the right to discharge the servant; (3) the right to control the servant; (4) that he is a master who is interested in the ultimate result of the work done as a whole but not in the details of of its performance.

Of these four supposed conclusive tests, it will be seen that applying them to the facts of this case two of them determine the engineer to have been the servant of the company and the other two make him the servant of McDonald; for the company had the right to select and to discharge the engineer, while on the other hand McDonald had the right of controlling him and was alone interested in the details of the work done by him, the company having no interest therein, its interest being solely in the result of the work — the widened cut.

In the application of these supposed tests to particular cases, great confusion and conflict of authority has arisen, but amid it all there seems to be a class of cases in which there has been uniformity of decision, and to this class the case before us is obviously assignable. The cases referred to are those in which a person hires the personal property of another and that other supplies, also under the contract of hiring, the servant who is charged with the general management and control of the property, in which cases, though the hirer acquires to a limited degree a dominion over the servant, with a right to superintend and direct his conduct, he still in legal contemplation continues the servant of the owner, who is responsible

for his negligence, though it occurs in the performance of that work which he does for the hirer and in which the hirer alone is interested. As where one hires horses and a driver from a jobman to draw his carriage, the owner and not the hirer is liable for the negligence of the driver. *Dean* v. *Braithwaite*, 5 Esp. 35; *Sammell* v. *Wright*, 5 Esp. 262; *Laugher* v. *Pointer*, 5 B. & C. 547; *Quarman* v. *Burnett*, 6 Mees. & W. 499. Or where one sends his team, wagon, and driver to work for a neighbor. *Michael* v. *Stanton*. 3 Hun, 462. Or where a vessel and crew are chartered by the day or for a voyage, the crew are the servants of the owner, even though, as a part of the contract, the hirer is to pay to the owner the wages of the crew. *Dalyell* v. *Tyrer*, El. Bl. & El. 899; *Fenton* v. *Dublin Packet Co.*, 8 Ad. & Ell. 835.

The reason is that the hirer, though he controls and directs the servants in a limited degree, does so not by reason of a contract with the servant, but under the contract with the owner; he directs them, not as his servants, but as those from whom he hired them. Shearm. & Redf. Neg., § 74.

In the case at bar there was a hiring of the train and the engineer by the company to McDonald; the reward was paid by the diminished price at which the excavating was to be done. If the engineer selected and furnished by the company had through negligence or incompetency exploded the engine committed to his care, it is evident that the company could not have recovered from McDonald for the injury as one caused by the negligence of his servant.

Judgment affirmed.

STONE v. YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

(62 Miss. 607.)

Railroads — power of State to supervise.

Even where the charter of a railroad company gives it the right to regulate its charges, the State may create a commission with power to see that it keeps within its charter limits, to prevent unjust discrimination, and to enforce such reasonable regulations as the State may deem necessary.*

* To same effect, *Railroad Co.* v. *Transp. Co.*, 25 W. Va. 324.

Stone v. Yazoo and Mississippi Valley Railroad Company.

APPLICATION for injunction against a railroad supervising commission. The opinion states the point. The plaintiff had judgment below.

J. W. C. Watson, for appellant.

James Fentress, for appellee.

CAMPBELL, C. J. It is claimed that the act creating the railroad commission is a violation of art. 1, § 8, of the Constitution of the United States, which vests in Congress power "to regulate commerce * * * among the several States," because the railroad of the appellee connects at Jackson, Mississippi, with the railroad system of the country and at Yazoo City with the waterways, and its inter-State and local commerce and interests are inseparable without ruin. The question thus presented is, how far is the State disabled by the constitutional provision quoted from governing railroads within its limits as to fares and freights."

There is no denial of the power of Congress "to regulate commerce * * * among the several States," for that is plainly conferred; but what is it to regulate commerce? Prescribing rates of compensation for service rendered by a railway company does not appear to us to be regulating commerce. The right to compensation is an essential attribute of such a corporation. It is the power to exist. Prescribing rates is providing for the existence of the artificial being. It is breathing into it the breath of life, that it may become a living being. The power to do this belongs to the sovereignty that may create corporations and shape their being and define their functions. It must be the State. Its power to create corporations for the various purposes of business and commerce has been uniformly exercised and never questioned. If it may create such corporations, it may determine their attributes and prescribe what they may charge for services rendered, as well as the other conditions of their existence. This belongs to the sovereignty of the State and is essential to the regulation of its internal police, and has not been surrendered to Congress. *People* v. *Babcock*, 11 Wend. 587; *Freeholders* v. *State*, 4 Zabr. 718. It is the sovereign power to govern the institutions of the State, and is not regulating commerce. It would seem to belong to the State alone, whose creature the corporation is, and whose right to shape its being, in this essential attribute, pertains to it because it is its

creature; and such we understand to be the doctrine of the Supreme Court of the United States as announced in *Railroad Co.* v. *Maryland*, 21 Wall. 456, and other decisions.

The principle supporting the decision in *Railroad Co.* v. *Maryland* is the right of a State, as a sovereign, to regulate and control the rate of transportation over its creature, the railroad built under a charter by the State. It is recognized by the opinion of the court, that in the very nature of things, the State must have control of rates over highways of its own creation, even though to exercise this power involves, consequentially, an imposition on persons and property carried from State to State. The railroad extended from Baltimore to Washington, and the State required payment to it of a fixed portion of all money derived by the company for carrying passengers from Baltimore to Washington city, and the question was whether this exaction by the State in the charter of the company was "a restriction of free intercourse and traffic between the different States," and it was declared not to be such. The plain assumption was, that unless the provision in the charter was a restriction of free intercourse and traffic, it was clearly within the legitimate power of the State. It was said by the court "that the power to charge for transportation and the amount of the charge are absolutely within the control of the State," and "this unlimited right of the State to charge or authorize others to charge toll, freight, or fare for transportation on its roads, canals, and railroads arises from the simple fact that they are its own works or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation." Attention was called by the opinion to the fact that when the Constitution was adopted transportation on land was performed entirely on common roads and in vehicles drawn by animal-power, and that "no one at that day imagined that the roads and bridges (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. They were all made either by the States or under their authority. The power of the State to impose or authorize such tolls as it saw fit was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation. The movement of persons and

merchandise, so long as it was as free to one person as to another, to the citizens of other States as to the citizens of the State in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the State or to private persons."

There is far more reason for denying authority to the State and claiming it for Congress as to the common roads which cross State lines than as to railroads. They are much more numerous than railroads. Their freedom from restriction is more important as affecting commerce on the borders of States than the freedom of railroads.

So in *Hull* v. *DeCuir*, 95 U. S. 485, the statute of Louisiana requiring common carriers of passengers to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance without distinction or discrimination on account of race or color was held to be a regulation of commerce and void, even within the State, so far as it affected vessels plying the waters of the Mississippi river between different States. The reason was, the steamboat was enrolled and licensed under the laws of the United States and engaged as a regular packet between different States upon the navigable waters of the United States. The vessel was in a sense an institution of the United States; deriving its right to pursue its business from the United States and navigating the national highway common to all, and not the property of private persons or deriving its existence from a State. As Congress had regulated the business by proving for licensing vessels and leaving the license free and untrammelled as to the accommodations of passengers, and as by the common law it pertains to the business of a common carrier to make reasonable and suitable regulations as regards passengers, it was held that Louisiana had no right to add a requirement not imposed by Congress, which in regulating the matter had left the common law in force as to this. As it belonged to Congress to legislate on this matter and it had done so, the action of the State was unauthorized and void wherein it added to the requirements of Congress. Under the acts of Congress and the common law with reference to which they were enacted, the licensed carrier might adopt its own reasonable regulations for the accommodation of passengers. The statute of Louisiana abridged this right and hindered its free exercise. It violated the privilege of a grantee of the United States; and therefore was declared to be of no effect.

This seems to us the true foundation of that decision. It was said by the chief justice, in delivering the opinion, that "State legislation which seeks to impose a direct burden upon inter-State commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress." We adopt this view, and hold that even in prescribing rates of compensation, which pertains exclusively to the State authority, as we believe, if a direct burden was laid upon inter-State commerce or a direct interference with its freedom was attempted, it would necessarily fail because of the absence of power in a State, in view of the Constitution of the United States, to obstruct the freedom of commerce among the States.

Our view is that the State may regulate rates, but cannot in the exercise of this power obstruct the freedom of commerce among the several States. In the opinion cited a distinction is drawn between acting "upon the business through the local instruments to be employed after coming within the State" and acting "directly upon the business as it comes into the State from without and goes out from within." This seems to be a full recognition of the distinction we have endeavored to draw between the local instruments of commerce existing by authority of a State and within its limits, and the commerce which may be carried on over them. Grant that whatever commerce goes, whether by land or on water, the power of Congress goes to secure its freedom from hindrance or discrimination by State authority, and it still remains true that the local instrument and vehicle of commerce, deriving its being from the authority of the State, is subject to its regulation in the essential attribute of earning a support and continuing to perform its functions and accomplish the end of its creation, and that the only limitation of the power of the State, with reference to commerce among the States, is to abstain from any obstruction of its freedom or any burden upon it.

It may be conceded that a State law requiring railway companies to give equal accommodations on cars going from State to State to all passengers would fall under the condemnation of the decision in *Hall* v. *DeCuir*, and it would not follow that State regulation of compensation for service must be denied, for there is a wide difference between the exercise of the right to live and act and those collateral matters which do not relate to the very existence of a being, but to its mere convenience.

Congress has not regulated railroads. They do not owe their existence to Congress. They do not operate by its license. They are State institutions and subject to State authority, in subordination to the constitutional inhibition of any restriction by the States of the freedom of commerce among the several States; not absolute freedom, but such freedom as makes no distinction between the rights of persons and things because of locality. The constitutional provision being considered was designed to prevent each State from legislating with reference to its own interest regardless of the interests of others. It should be so construed as to accomplish this end, and should be limited to that.

Pensacola Telegraph Co. v. *West*, 96 U. S. 1, was decided on the principle that a State may not obstruct or unnecessarily incumber an instrumentality of commerce and of government authorized by it.

In *Lord* v. *Steamship Co.*, 102 U. S. 541, the act of Congress limiting the liability of the owner of any vessel navigating the high seas between ports of the same State, in certain cases specified in the act, was upheld as a valid exercise of the power of Congress to regulate commerce.

In delivering the opinion, the chief justice lays stress on the fact that the vessel, on her voyages between the ports of the State, entered on a navigation which was necessarily connected with other nations, because she went out of California and the United States and upon the ocean, the common property of all nations.

What analogy is there between a vessel navigating the ocean and a railroad situate wholly within a State, but connecting at the State line with a railroad in another State? Does it arise from the fact that these connecting roads afford a track for trains of cars to be drawn from State to State? While the train is in one State it is subject to its jurisdiction. The instant the State boundary is crossed the jurisdiction of another State attaches. The right of each State to govern within its limits must be upheld. This right to govern is limited only by the Constitution of the State and of the United States. The contention now being examined is that government by the State within its limits of such railroads is denied because Congress has power to regulate commerce among the several States. The reply is that the local instrument, or vehicle of commerce existing in the State by its authority, including the trains while in the State, are subject to all such regulations

adopted by the State for their government as are not, in their nature and effect, an imposition upon or a hindrance of free intercourse and traffic between the States. The State cannot, in regulating rates or in any other manner, discriminate against persons or products of other States or countries, but it may govern all within its limits impartially and justly. In the State, cars and cargo and passengers are amenable to its laws, although they will soon become subject to the laws of another State which possesses like power of control over them, subject to the constitutional restriction against burdening or hindering commerce. Any unauthorized restriction would fall by the silent operation of the Constitution of the United States, made effective through the courts; and it may be admitted that Congress could lawfully legislate on this matter to the extent necessary in its judgment to smooth the way of commerce carried on over railroads from State to State, as many contend, and still it would not follow that Congress can fix the rates of compensation for carriage in a State.

In *Telegraph Co.* v. *Texas*, 105 U. S. 460, it was decided that the business of a railroad or telegraph company "is commerce itself," and that a tax by the State for each message sent was unlawful as an imposition on messages sent beyond the State, but that is a widely different question from that of the right of a State to deal with the earning capacity of individuals or corporations.

Commerce among the different States must be free — not free from the cost of service, not to go without paying its way, but free from impositions on it the necessary effect of which is to hinder it.

In *Munn* v. *Illinois*, 94 U. S. 113, it was decided that the regulation of warehouses for the storage of grain, owned by private individuals and situated in Illinois, although "used as instruments by those engaged in State as well as those engaged in inter-State commerce," was a thing of domestic concern and pertained to the State. The warehouses were declared to be no more a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. This utterance was as to the effect of the power of Congress to regulate commerce; and it is observable that the distinguished judge who delivered a dissenting opinion in that case did not place his dissent on the ground that Congress had the power to regulate the storage of grain in the warehouses. This decision affirms the right of the State to regulate the business of one engaged in a

public employment in that State, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

The regulation of a public employment conducted in a State by natural persons belongs to the State in whose jurisdiction they are. There can be no distinction between natural and artificial persons except this: natural persons possess rights not conferred by the State, while corporations depend on the act of their creation for their rights and powers. They must exist and act as made by the authority which brings them into being. The State, being the creator of a corporation, must determine its attributes and functions, and it must, from the necessity of the case, act in obedience to the law of its being.

The State may not invade the domain of Congress and regulate commerce among the several States in creating corporations any more than in any other way, but as it is for the State to create corporations, and as they cannot live without earning money, the power to earn it and the limit of their right in this respect must be subject to the regulation of the authority of the State, because it is not regulating commerce. It is incidentally or consequentially affecting it, perhaps, but to deal with the local instrument of commerce in a manner vital to its existence is not regulating commerce in the sense of the Constitution. It is providing for the very being of the corporation, just as the State protects the natural person in the enjoyment of all his rights.

Congress has supreme, and it may be conceded exclusive, power over commerce among the several States, and any attempt of the State to regulate this commerce or to fetter or burden or restrict it in any way is unconstitutional, but it is not every thing which may incidentally or consequentially affect this commerce which is to be held void. A regulation of inter-State commerce as such is prohibited, but power may be legitimately exercised by the States in many ways over the instruments of commerce among the States and not be justly condemned.

So long as there is no discrimination against persons and things carried across State lines, or attempt so to regulate such movement as to affect it because it is across the State boundary, it cannot be said that there is an unwarranted interference with commerce among the States.

The railroad commission is not a restriction or hindrance of the

freedom of commerce, but is intended to facilitate it and smooth its way by removing hindrances. The fear is professed that the commission will cripple or destroy the instruments of commerce. If there is danger of this, that cannot make any difference, so far as relates to the question now being discussed, because the creator may at pleasure destroy the work of its own power, unquestioned as to the right to do it.

In *Peik* v. *Railway Co.*, 94 U. S. 164, it was held that the legislature of the State of Wisconsin had the power to prescribe a maximum of charges to be made by a railroad company, whose road was connected by means of a bridge and a consolidation of companies with a railroad in another State, for transporting persons or property within the State, or taken up outside the State and brought within it, or taken up inside the State and carried without. The right of the State was put on the ground of the absence of action by Congress on the subject, and because of this it was said the State could provide for the people within the State, even though it might indirectly affect those without. Of course this reasoning implies the existence of power in Congress to regulate charges, which we question.

Congress has not attempted to regulate the charges to be made by railroad companies, and if the right of the State to act with reference to fares and freights carried across the boundaries of the State depends on the absence of congressional action, the right of the State must be upheld.

The authoritative declaration is that the power to regulate commerce among the several States is exclusively in Congress and denied to the States in all those cases where from the nature of the subject uniformity of regulation is required, and that as to these subjects the absence of congressional legislation is equivalent to a declaration that there shall not be any regulation, and any State legislation in such cases must fall before the silent but efficient power of the Constitution.

We think that regulating rates for the transportation of persons and property does not fall within the class of matters requiring or admitting of uniformity. Perhaps no subject admits of and demands greater diversity with varying localities and circumstances justly affecting the value of service.

If a State should build and operate a railroad connected with the railway system and navigable waters of the country for revenue,

might Congress prescribe charges over it for persons and things *en route* beyond the limits of the State? May Congress regulate tolls and charges on the Erie canal, connecting the navigable waters of the lakes with those in the east?

Section 6 of the charter of the appellee confers on the company power to fix from time to time by its board of directors the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act.

The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion, or within prescribed limits fixed by the charter, has been the common practice of the legislatures of the States of the United States from an early period of their history. The right of the corporators to exercise the power conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable — an exclusion of tacit or implied conditions on the subject. It is an essential part

of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear; that this was a valid contract by the State, obligatory and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation.

If any thing is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.

The appellee has the unquestionable right from time to time, by its board of directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired. The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as moulded by the judicial utterances of half a century of constitutional government in America.

While the rates at which the appellee will transport over its roads, not exceeding what is stipulated for in the charter, are for the determination of the appellee and not subject to the control within the chartered limits of the State, it is indisputable that the State may create a commission or board by any name to see that the creature of the State keeps within its charter limits and violates none of its obligations as a common carrier. Whatever the charter rights of the appellee, there are many police regulations the State may lawfully adopt, and it may commit their enforcement to any agency of its selection. It may intrust the oversight and supervision of the operations of railroads to a commission

charged with the duty of guarding against abuses the State has the right to correct.

We do not feel called on to pass upon all of the numerous provisions of the act complained of, and will decide only so much as will properly dispose of this case, leaving other questions to be decided as they arise. The bill is to restrain the commission "from interfering with the tariff of charges of (complainant), or with the operation, control or income of said railroad * * * and from * * * any revision of orator's tariff, or from instituting or aiding in the prosecution of suits for recovery of penalties under said acts, or doing any thing under said acts as to orator."

In view of what is written, it must be held that the railroad commission cannot interfere with the rates fixed by the board of directors of the appellee from time to time for transporting persons and property over its railroad, if those rates are within the limits prescribed by the charter, and that the commission cannot adopt any rule or regulation as to rates violative of the clearly expressed or necessarily implied charter rights of the company; but while this is true, the commission may investigate the control and operation of the company in order to ascertain that it is conforming to its authorization by the charter. It may do many things contemplated by the act creating it without any violation of the inviolable rights of the company. No reason is perceived why the company may not be required to submit its tariff of charges to the commission in order that it may see that it conforms to the limits fixed by the charter. So it may be said that the company has no right to make unjust discrimination or show partiality not authorized by its charter in transporting persons and things, and all this the commission may look after, and it may hear complaints as to any matter over which it has control as to the operations of the company.

We do not see why the appellee shall not be subject to the requirement of the thirteenth section of the act creating the railroad commission and be bound to give notice, as required by that section, to the commissioners in case of any accident to a train attended with serious personal injury. And we think the appellee is subject to the eighteenth section of the act as to a suitable reception-room at each depot and as to bulletin boards.

Our view is that the right this company has secured by its charter to fix rates and to manage its affairs by a board of directors does not exempt it from such reasonable regulations as the State

from time to time may see fit to adopt for the impartial government of railroads in the State for the interest of the people. This company may fix rates and collect them within the limits of its charter, and may earn all it can within these limits, but it is a creature of the State, subject to its government and control, except wherein the State has renounced in plain terms its right of regulation and control. The rights of the company, secured by its charter, must be upheld, and the railroad commission must abstain from any interference with these rights; but outside of these bounds and as to all those legitimate requirements of legislative authority prescribed in the interests of the community and consistent with the full enjoyment of its contract rights by the company, it must yield to the authority of the State to supervise it.

The act creating the railroad commission is not violative of the fourteenth amendment of the Constitution of the United States or of any provision of the Constitution of the State, in that it creates a commission and charges it with the duty of supervising railroads.

As before stated, we do not intend to express an opinion on all of the provisions of the act. Many questions may arise under it not necessary to be now disposed of, and we leave them for consideration when presented. We hold that the State had the right to create an agency of the State to exercise such supervision as it may lawfully employ over railroads within its limits, and to have declared the immunity from interference secured to the appellee by its charter, and this is all that is necessary to dispose of this case.

Decree reversed, and decree made here to modify the injunction in accordance with this opinion.

VICKSBURG AND MERIDIAN RAILROAD COMPANY v. MCGOWAN.

(62 Miss. 662.)

Negligence — contributory — being on railroad track.

It is not necessarily negligent for one to be upon a railroad track where he has no right to be, and he may recover for an injury by the negligence of the company in running at an unlawful rate of speed if he himself was not otherwise negligent. (*See note, p.* 208.)

ACTION for personal injuries by negligence. The opinion states the point. The plaintiff had judgment below.

Nugent & Mc Willie, for appellant.

W. A. Montgomery, for appellee.

CAMPBELL, C. J. [Omitting other matters.] There is in the books much confusion on the subject of contributory negligence. The principle on which the doctrine rests is that the plaintiff cannot recover for the negligence of another if by ordinary care he could have avoided injury from such negligence. Contributory negligence is the want of ordinary care to avoid injury from the act of another. One must use due diligence or ordinary care to avoid injury from another, failing in which he may not recover for what by such diligence or care he might have avoided. Whether in any case the plaintiff used the requisite care to avoid injury depends on the circumstances in which he was called on to act.

One who contributes directly to his own injury, by a failure to exercise the ordinary care which would have saved him from harm from the negligence of another, is denied the right to recover, because the law will not undertake to apportion the blame between parties mutually in fault.

In this case the plaintiff was on the track of the defendant when he was struck by a locomotive and injured. Although he may have been improperly on the track where he was, and although the defendant may have been a wrong-doer by violating the statute as to the rate of speed, the plaintiff is not entitled to recover, if notwithstanding the wrong of the defendant, he could by ordinary care have avoided injury from the act of the defendant. The railroad company had the right to a clear track, and the plaintiff, in walking on it as he did, was bound to know he was in danger and to be on the lookout to escape harm from his perilous situation. He had the right to assume, that while the company had the right to a clear track it would conform to the law forbidding a greater rate of speed there than six miles an hour, but the company had the right to assume that its track was clear or that any one on it would get off on the approach of a locomotive. Therefore the fact that the plaintiff was on the track, where he should not have been, and that the defendant violated the law as to the rate of speed or otherwise, if such is the fact as to both parties, is not decisive of the question of right in the plaintiff and liability on the defendant. That is to be determined by considering whether, notwithstanding the wrong

of the plaintiff in being where he was and the wrong of the defendant in disregarding the law, if such be the case at the time, in the place, and under the circumstances, the plaintiff, by the ordinary care applicable to such time, place, and circumstances, could have avoided injury from the wrong of the defendant. If he could, he should not recover, and this is what we understand to be meant by contributory negligence. "One person's being in fault will not dispense with another's using ordinary care for himself."

It is not contributory negligence *per se* to be on a railroad track at a place where the person has no right to be. A person's being there is a condition but for which injury could not be done him by the locomotive or cars, but his being there is not what constitutes contributory negligence. Being there at such a time and under such circumstances as may be shown, or failing to use his senses as becomes him, and to act under the circumstances with ordinary care and caution to avoid harm may constitute contributory negligence, which will prevent recovery. One has no right to walk on a railroad track at a place other than a crossing, but whether his being on the track not at a crossing is contributory negligence depends on circumstances. One may be guilty of contributory negligence at a crossing or where he has a right to be. The criterion is whether he observes due care under the circumstances of his situation, whatever it may be, to avoid harm from the act complained of. One may be technically a trespasser, and if he uses due care to avoid injury from the wrongful act of another he may recover, and he may not be a trespasser and yet be guilty of such contributory negligence as to preclude him from recovery. It seems that this is the view held by the court below, but in applying it to the case, it is probable that the jury was misled by the fourth instruction for the plaintiff. given in the language of the statute, without qualification or explanation, and which taken literally, as we have stated, conveys the idea of absolute liability on the part of the railroad company which violates it for any injury suffered while it is thus acting. It may appear strange that an instruction in the very language of a statute should be disapproved, but it is not always safe to rely on the letter of the law. It may be so used as to mislead. "The letter killeth."

[Minor matter omitted.]

So people are in the habit of crossing and going along railroads, oftentimes most imprudently. The statute prohibiting rapid run-

ning in cities, towns and villages was designed to protect life and property, because of the known imprudence of many who need protection against themselves. Knowing that a train is prohibited from being run at a greater speed than six miles an hour in town, one may, in crossing or in walking on the track, assume that the law will not be violated; but as it may be, and often is, he who undertakes to make a perilous journey across or along a railroad is bound to be on the alert for coming trains, and cannot hold the company responsible for what he might avoid by ordinary caution. He is not to be pronounced guilty of contributory negligence merely for being on the railroad where he should not be, but inquiry is to be made as to the time, place and circumstances, and as to his conduct, in view of the negligence complained of, in order to determine whether he was wanting in that care the absence of which constitutes contributory negligence preventing recovery. "What is reasonable care in any case depends upon the particular circumstances of that case."

Reversed and remanded.

NOTE BY THE REPORTER.— See *Terre Haute, etc., Ry. Co.* v. *Graham*, 95 Ind. 286; s. c., 48 Am. Rep. 719.

In *McAllister* v. *Burlington, etc., R. Co.*, 64 Iowa, 395, the court, in a similar case, said: "We think that it should be held, as matter of law, that the plaintiff has no right of recovery. It is perhaps true, that by walking upon a railroad track at points away from public crossings, persons are not technically trespassers. They are not trespassers in the sense that they are liable to actions by the owners of the road. A person who, for pleasure or from curiosity, enters a manufactory, and walks among the machinery and exposes himself to danger, is not a trespasser in a legal sense. But if he does not keep out of the way of the machinery, and is injured, he cannot recover, because he put himself in a place he had no business to be, and his very presence is contributory negligence. So where an adult person, in full possession of mind and senses, for his own convenience, walks upon a railroad track away from a crossing, he is in a place where he is not invited, and he has no right to demand that the persons operating trains shall be on the lookout to save him from injury.

"If we understand the plaintiff, he claims, that because the view was unobstructed, the engineer should have seen him, and avoided injuring him, by some signal or otherwise. It cannot be denied that the plaintiff was negligent. He permitted a train which was in full view for 2,000 feet, and running at a low rate of speed, to run him down and injure him, and at a point where he had no right to be. It is true, that if the engineer had discovered that plaintiff was on the track, and after he saw that the train was so close to him as to be dangerous, he could have avoided the injury by the exercise of reasonable care, it was his duty to do so. *Morris* v. *C., B. & Q. Ry. Co.*, 45 Iowa, 29.

"But as he did not see him, and was ignorant of any danger to the plaintiff, it was not obligatory upon him to look out for him or warn him off. The principles we here announce have been so often promulgated by this and nearly all other courts of last resort in this country that they have become elementary. A citation of the numerous cases would be a work of supererogation, and in closing this opinion, we cannot better express our views than to repeat the language of the court in the case of *Ill. C. Ry. Co.* v. *Hall*, 72 Ill. 222: 'It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risks of the perils he may encounter. The crossing of a track of a railroad is a different thing. The one is unavoidable, but in the other case he voluntarily assumes to walk amid danger constantly imminent. * * * It was shown that trains passed frequently. No prudent man would expose himself on that part of the road, without keeping a constant and vigilant watch for the approach of trains. This appellee did not do. * * * If a party will not exercise ordinary care for his personal safety, he ought to bear the consequences that may ensue.'"

McGehee v. State.

(62 Miss. 772.)

Criminal law — assault — intending one and injuring another.

One who intending to kill A., assails B. in the dark, may be indicted for assault with intent to kill B.*

CONVICTION of assault with intent to murder. The opinion states the case.

W. P. Cassedy, for appellant.

T. S. Ford, attorney-general, for State.

ARNOLD, J. Appellant was convicted of assault with intent to kill and murder Levi Thompson and sentenced to one year's imprisonment in the penitentiary. At a public gathering about twelve o'clock at night one George Morris had a difficulty with appellant's brother, and cut and seriously wounded him. Afterward Morris started home and appellant followed him, intending, it seems, to avenge the injury suffered by his brother. It was a

*To same effect, *State* v. *Gilman* (69 Me. 163), 31 Am. Rep. 257; *contra*, *Lacefield* v. *State* (34 Ark. 275), 36 Am. Rep. 8.

very dark night, and appellant overtook Levi Thompson in the road, who had started before him, going in the same direction. and supposing him to be George Morris, cut and dangerously wounded him with a knife. As soon as Thompson was struck he spoke, and appellant desisted and ran rapidly away. It was so dark that Thompson could not see or tell who it was that struck him. On the next morning appellant admitted that he was the person who cut Thompson, and said he thought he was cutting George Morris; that he did not intend to cut Thompson, and was sorry he had mistaken him for Morris, and that if it had been Morris he would have cut him to pieces. Appellant and Thompson were the best of friends, and there had never been any difficulty between them before.

It is urged for appellant that the intent charged was not proved.

Thompson was the only person in reach of appellant at the time he committed the offense with which he is charged. He intended to assault that person with a weapon which the jury found to be a deadly weapon. His blows did not miss the object at which they were aimed. He may not have intended to kill Thompson, but he was properly convicted if he intended to kill the man at whom the knife was directed. The evil and specific intent to strike the form before him at the time is manifest, and that form proved to be Thompson. That there was a mistake as to the identity of the person intended to be injured constitutes no defense. If appellant did to Thompson what he intended to do to Morris he is as guilty under the statute as if no mistake had been made. 2 Whart. Cr. Law, § 1279; 1 Russ. Crimes, 1001, 1002 (9th ed.); *Regina* v. *Smith*, 33 Eng. L. & Eq. 567; *Regina* v. *Lynch*, 1 Cox C. C. 361.

And this is not in conflict with the settled doctrine in this State that on a charge under the statute of assault with a deadly weapon with intent to kill and murder a particular person, it is necessary to prove the specific intent as laid in the indictment. There is no error in the record.

Judgment affirmed.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA.

STATE v. PLANTS.

(25 W.Va. 119.)

Jurisdiction — offense on vessel in river.

The State of West Virginia has jurisdiction of a criminal offense committed on a vessel on the Ohio river, within low-water mark, opposite the territory of West Virginia, although moored to the bank within the boundaries of the State of Ohio.

HABEAS CORPUS. The opinion states the case.

G. J. Walker and *W. Miller,* for plaintiff in error.

Watts, Attorney-General, for State.

JOHNSON, Pres. This is a writ of error to the judgment of the judge of the Circuit Court of Jackson refusing to discharge the prisoner on a writ of *habeas corpus.*

[Omitting statements.]

From the bill of exceptions it appears, "that on the 21st day of March, 1880, the sale of spirituous liquors mentioned in the complaint, warrant and *mittimus* in his proceedings was made to said complainant, J. W. Dye, by petitioner on petitioner's boat, which

then lay on the Ohio side of the Ohio river opposite the town of Ravenswood; that the river was at the date aforesaid at a high stage; that said boat was tied by a cable at the time of said sale to the bank on the Ohio side of the river; that said boat was against the willows growing on the Ohio shore and against the bank on the Ohio side; that a plank from ten to twelve feet long extended from said boat to the bank on the Ohio side; that the said boat at the time of said sale was wholly and at least ninety yards within low-water mark at that point, and would have been that distance on the shore on the Ohio side of said river, if said river had then been at low-water mark, and that said boat was and would have been wholly within and beyond the water on the Ohio shore, if said river had then been at a medium stage, but that said boat would have been within the banks of said river."

[Minor points omitted.]

The main question presented in this case is: Did the State of West Virginia have jurisdiction of the offense committed? Was the offense committed within the jurisdiction of Jackson county or within the exclusive jurisdiction of Ohio? If it was committed within the exclusive jurisdiction of Ohio, then the prisoner should have been discharged; but he should have been remanded, and the judgment is right, if the offense was committed within the jurisdiction of West Virginia.

In *Handly's Lessee* v. *Anthony*, 5 Wheat. 375, in which case Chief Justice MARSHALL announced the opinion of the whole court, the question was, whether a grant issued from the State of Kentucky to a tract of land or a grant from the United States, when the land was supposed to be in the territory of Indiana, was valid; and this raised the question, as the court held, what was the true construction of the Virginia deed of cession of the North-west territory to the United States made in 1783, and what was the true boundary between the States of Kentucky and Indiana? The court held that the boundary of the State of Kentucky extended only to low-water mark on the western or north-western side of the Ohio river. The chief justice conceded in that case, that Virginia had not ceded to the United States any part of the Ohio river, but had retained in her own territory the whole of said river; but he defined the river to be the water at low-water mark.

The only case in Virginia on the subject of the boundary between Virginia and Ohio is *Garner's* case, 3 Gratt. 655. Garner

and two others were indicted in the Superior Court of Wood county, at the September term, 1845, for enticing away six slaves of John H. Harwood. The second count charged that they carried out of the State the said six slaves; the third, that they assisted the said slaves to escape. The prisoners pleaded not guilty, and the jury found a special verdict, in which it appeared that the prisoners went under the bank of the river and remained there some distance above the water on the beach until about one or two o'clock at night, when a canoe with six slaves, the property of J. H. Harwood, crossed the river to the Ohio shore. As it came near the shore the party under the bank gave it a sort of hail, to which an answer not distinctly heard was returned from the canoe; said negroes landed said canoe obliquely against the bank, running the bow on the beach at the water's edge. As soon as the canoe struck the shore the prisoners came to the bow of the canoe at the water's edge, and without entering the canoe stepped into the water at the bow and assisted the negroes to take their articles of property out of the canoe. The party in ambush seized the prisoners as well as the negroes, except one, and carried them across the river to Virginia, and took the prisoners to jail. It further appeared that the spot where the offense was committed was between low-water mark and high-water mark.

The case was adjourned to the General Court of Virginia for novelty and difficulty arising on the special verdict. The questions adjourned were:

"First. From the facts found, was the offense committed within the jurisdiction of the court?

"Second. What is the territorial boundary of Virginia on the north-western side of the Ohio river? Is it the lowest water mark, or is it the ordinary low-water mark, or does it extend to the water mark made by the river when it is at its average depth, as found by the verdict, or does it extend to the top of the banks?

"Third. Is the jurisdiction of Virginia co-extensive with the water while it is confined within its banks?

"Fourth. What is the effect of the grant of Virginia in her compact with Kentucky of concurrent jurisdiction to other States possessing the opposite shore of the Ohio river upon the jurisdiction of Virginia on the said river?

"Fifth. What judgment ought this court to give on the said special verdict?"

The case was heard by fourteen judges at the December term, 1846, of the General Court. The judges sitting in the case were Smith, Lomax, Scott, Brown, Duncan, Fry, Clopton, Baker, Christian, Wilson, Johnson, Robertson, McComas and Taliaferro. The court answered but two of the questions adjourned, the first and the fifth. The first is answered, that from the facts found, the offense charged was not committed within the jurisdiction of the court of Wood county or of the State of Virginia. To the fifth, that judgment ought to be rendered in favor of the prisoners. Judges SCOTT, BAKER, CHRISTIAN, ROBERTSON and MCCOMAS dissented from the opinion of the court. Judge CHRISTIAN filed no opinion, but the other dissenting judges distinctly held in learned arguments that the river is composed of its bed, shores and banks, as well as of the water that flows between the banks, and that the language in the deed of cession "of the territory northwest of the Ohio river" conveyed no part of the river, and that the boundary therefore between the two States is ordinary high-water mark. Judge DUNCAN concurred with the majority in the judgment that the prisoner ought to be discharged, but put it on technical grounds and expressed no opinion on the question of boundary. Judges JOHNSON, CLOPTON, WILSON and TALIAFERRO agreed fully with the Supreme Court of the United States in *Handly's Lessee* v. *Anthony* that the boundary between Virginia and Ohio was low-water mark. SMITH and BROWN concurred in the judgment, but gave no reasons therefor. Judges FRY and LOMAX delivered elaborate opinions, in which they approved the decision of the Supreme Court of the United States, but maintained that nevertheless Virginia had jurisdiction on the river at all times, while it was within its banks. Judge FRY says, page 758:

"The jurisdiction may extend to whatever is afloat upon the water. Yet is there no exception to this, nor any limit to the jurisdiction short of the utmost verge of the current? Does it extend to vessels that have entirely passed low-water mark and reached the shore of Ohio and there rest upon it wholly above low water, and to the acts of persons standing on the shore at the verge of the water but in it? We have seen that Judge REED states it has been decided in Ohio that if a boat be attached to either shore, for the purpose of civil and criminal process the jurisdiction was exclusive in the State to which it was attached. He perhaps alludes to the case reported 1 West. Law Journal,

wherein it was adjudged that an attachment by process from Kentucky levied on a boat lying at the wharf at Cincinnati and fastened to the wharf, was not lawful. The boat was fully afloat, and lying with her stern at least (if I remember aright) below low-water mark. If the principle of the decision be correct it seems to me to apply *a fortiori* to the case before us. In examining it we should consider that we are probably deciding the law for the Virginia shore as well as that for the Ohio. Whatever rights we claim upon her shore we have perhaps accorded to her upon our own by the grant of concurrent jurisdiction. Was it well decided and proper to be admitted and followed by this court? It seems to me that the principle is expedient, necessary and well founded. * * But whether a boat so afloat and fastened be within the exclusive jurisdiction or not, it seems to me that a citizen of Ohio standing upon her soil above low water, or a boat resting on her shore above the same, is within the jurisdiction of Ohio, and so the *locus delicti* without the county of Wood; and that consequently there should be judgment for the prisoners."

Judge LOMAX, after discussing the question at p. 784, said: "My opinion therefore is, that the second position of the Commonwealth's counsel has been sustained; that the jurisdiction of Virginia extends over the entire body of water constituting the river at any given time." * * "Had the place where the prisoners were standing been left bare at the time by the refluent waters, my opinion would have been that the courts of Virginia would have no jurisdiction of the offense. Had it been committed entirely upon the water (*e. g.*, in a boat floating upon the river), then my opinion would have been that the offense was committed within the domain, and consequently within the jurisdiction of Virginia. The peculiarity and novelty of this case is that the jurisdiction of Virginia in respect to the waters of the river is asserted over persons who in respect of the land upon which they stood were exclusively within the jurisdiction of Ohio."

I do not propose to make any extended review of the arguments used either in the case in 5 Wheaton or in *Garner's* case. In the former case the court, it seems to me, gave a wrong definition to the term river. It is there called the permanent stream, that is, the stream always there; then it must mean the water when it is at the lowest. If this be true, the *ab inconveniente* argument is not good, because common observation tells us, there is a considerable space on the shore between extreme low-water mark and ordinary low-

water mark. Which State would have jurisdiction over this space? The best authors do not confine a river to the water at any given stage. Judge McComas in same case, p. 682, says: "The most approved of these writers (on the laws of nations) define a river to consist of the water, the bed and the banks. It is a compound idea; it cannot exist in the absence of any of its constituent parts. Deprive it of a bank, and it loses its character of a river. Take from it its bed, and the same consequences ensue. It cannot be confined to the simple term water, because that is only an ingredient of the compound. Then you must necessarily associate the bed, the banks and the water, to constitute any idea of the term river." This court in the case of *Ravenswood* v. *Flemings*, 22 W. Va. 52, held, that it required the bed, shores and banks as well as the water, to constitute the Ohio river. And we then held, that the State of West Virginia held title in trust for the public of the whole of said river including its bed, shores and banks, so far as it traversed its territory. Speaking for myself, I agree with the dissenting judges in *Garner's* case, that ordinary high-water mark on the north-western side of the Ohio river is the boundary between the State of West Virginia and Ohio.

But it is not necessary to decide this question in this case. The question here presented was not decided in *Garner's* case. The question here is the third one adjourned to the General Court in that case: "Is the jurisdiction of West Virginia co-extensive with the water, while it is confined within its banks?" We are in this case prepared to hold, that the jurisdiction of West Virginia is co-extensive with the water of the Ohio river, while it is confined within its banks, and that the State in the proper county has jurisdiction of offenses committed on a boat afloat on the Ohio river while confined within its banks, whether such boat is or is not fastened to some object on the bank. If this were not so, our citizens might with impunity violate our revenue and other laws. But without regard to the consequences, which might follow it, the State did not possess such jurisdiction, Virginia, which confessedly owned before the cession the territory, through which the Ohio river runs, did not cede away her jurisdiction over the waters of the river, no matter what the stage was, so long as it was confined within its banks.

There is no error in the judgment of the judge of the Circuit Court of Jackson county, and it is therefore affirmed.

Judgment affirmed.

CHANCEY v. SMITH.

(25 W. Va. 404.)

Landlord and tenant — abandonment of premises.

Where a tenant merely removes from the leased premises during his term, the landlord is not authorized to re-enter and put another tenant in possession, and the first tenant may recover the possession.

ENTRY and detainer. The opinion states the case. The plaintiff had judgment below.

J. G. Schilling, for plaintiff in error.

SNYDER, J. Action of unlawful entry and detainer tried before a justice and taken by appeal to the Circuit Court of Roane county, where the case was tried by jury and a verdict rendered and judgment given for the plaintiff, J. T. Chancey, and the defendant, John Smith, brought the case to this court by writ of error.

All the facts proved are certified and are in substance as follows: The plaintiff, Chancey, rented the premises in controversy for one year ending March 1, 1883, took possession and was living on the premises and in August, 1882, he rented the same for another year to expire March 1, 1884. In the fall of 1882, he sowed a part of the land in wheat and in November of that year he moved off the farm leaving some fodder and hay thereon which he sold during the winter, but when he left he requested one Riddle to look after the farm and put up the fences; that in March, 1883, J. W. Hall, from whom the plaintiff had leased, rented the premises to the defendant and he moved on them March 27, 1883, they being then unoccupied except by the wheat crop sown by the plaintiff and the hay and fodder left thereon as aforesaid; that the said Hall claimed he had rented the farm to the plaintiff for the second year on conditions, and that as the plaintiff had left it and let the fences go down so that it was out in the commons, he, Hall, intended to hold the farm if he lawfully could.

The defendant asked the court to give the jury five instructions, the substance of which is embraced in these propositions:

1. That if the jury believe the plaintiff was not in the actual possession of the premises at the time the defendant took possession, they must find for the defendant.

2. If the jury find that the plaintiff leased from Hall and lived on the premises, but afterward moved off, and then while the premises were unoccupied the said Hall leased the same to the defendant and put him in possession, they must find for the defendant, although the lease of the plaintiff from Hall had not expired; and

3. If the jury believed that the plaintiff quit the premises by his own act, then the crops, if any on the premises, became forfeited and belonged to Hall, his landlord.

The court refused to give any of said instructions, but in lieu thereof gave the following:

"If the jury believe from the evidence that the plaintiff leased the premises mentioned, and that his term had not expired, and that he had the possession thereof, and that the defendant, during the plaintiff's term, and while the plaintiff was so in possession by occupation or the cultivation of the land, leased said land and entered upon said premises without the consent of the plaintiff, then the jury should find for the plaintiff and ascertain his damages; but if the jury, on the other hand, believe from the evidence that the plaintiff had so rented, and that his term had not expired, yet that the plaintiff had abandoned his lease and his possession of the said land and premises, and that after such abandonment by the plaintiff of his lease and possession, the defendant rented said premises and entered thereon, then in that case the jury should find for the defendant."

The defendant excepted to the action of the court in refusing to give his instructions and in giving the said instructions in lieu thereof. These rulings raise the first question to be decided.

In order to maintain an action of unlawful entry or detainer it is essential that the plaintiff shall have actual possession or the right to the possession, and that the defendant should be a wrongdoer, but where he has the right it is not essential that he should also have the actual or physical possession, the *pedis possessio*, at the time the unlawful entry is made by the defendant. *Storrs* v. *Feick*, 24 W. Va. 606; *Duff* v. *Good*, 24 W. Va. 682.

The landlord, by leasing the premises and placing the tenant in possession, transferred both the possession and the right to the possession to the tenant during the term of the lease, and during the term he could have no more right to enter than a stranger. All his rights, so far as the possession was concerned, were absolutely vested in his tenant; if however the tenant forfeits his lease

or entirely abandons the premises, then the right to the possession reverts to the landlord and he may lawfully enter. *Mitchell* v. *Carder*, 21 W. Va. 277.

In the case at bar it does not appear that the plaintiff had either forfeited his lease or abandoned the premises. He left a growing crop on part of the land and also some hay and fodder, and placed the farm under the care of Riddle to look after it and put up the fences. He showed no purpose of abandoning it, but his acts and conduct clearly indicate an opposite intention. And there is no evidence of any forfeiture of the lease. The fact that the plaintiff moved off the premises without abandoning them or an intention to do so did not amount to a vacation of the possession or a forfeiture of his lease. It follows therefore that neither of the instructions of the defendant properly stated the law, and especially when applied to the facts in this case, and consequently they were each properly rejected. The instruction given by the court was a correct exposition of the law in my opinion, as applied to this case. It was certainly as favorable to the defendant as the law and the facts would permit, and he has no ground to complain of it.

[Minor matters omitted.]

For the foregoing reasons, I am of opinion that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

Beard v. Beard.

(25 W. Va. 486.)

Payment — voluntary — recovery.

Where the defendant in a suit, with full knowledge of the facts, voluntarily pays part of the demand, and judgment is rendered against him for the balance, which is conclusively reversed on appeal, he cannot recover the part so paid.*

BILL for injunction. The opinion states the case. The injunction was denied below.

R. F. Dennis, for appellant.

A. F. Mathews, for appellees.

*See *Buffalo* v. *O'Malley* (61 Wis. 255), 50 Am. Rep. 137, and note, 139.

JOHNSON, Pres. Abram Beard in February, 1884, filed his bill of injunction in the Circuit Court of Pocahontas county against John G. Beard and others, in which he alleged that the defendants other than the sheriff of the county in 1883 recovered a judgment against him for $197.10 with interest and $64 costs; that in 1881 the defendants (except said sheriff) filed their bill against him in the Circuit Court of Greenbrier county, the object of which was to compel him, as administrator of his deceased wife, Martha A. Beard, to settle his accounts as such, and to obtain a decree against him in their favor as distributees and next of kin of said Martha A. Beard for any sum that might be in plaintiff's hands as such administrator; that in said cause on November 25, 1881, a final decree was entered against him in favor of the plaintiffs as such distributees for $366.17; that from such decree he appealed, and the Supreme Court of Appeals reversed the said decree, holding that the personal funds in his hands as administrator of his deceased wife belonged to him as her husband, and not to the plaintiffs in said suit; that while said last named cause was pending in the Circuit Court of Greenbrier county, the said court entered a decree referring the cause to a commissioner for an account, thereby deciding, as plaintiff was advised and believes, that he as administrator of his deceased wife was liable to the plaintiffs in said cause, and after said decree was entered, he on August 17, 1881, paid to Alex. F. Mathews, attorney for said distributees, the sum of $200 on account of what might be due from him to said distributees; that all said defendants except the said sheriff are insolvent; that he has a right to have credited on said execution the said sum, and also his costs in the said suit in Greenbrier county and in the appellate court; and prayed that said execution then in the hands of said sheriff might be enjoined to the extent of the sums of money aforesaid. The injunction was granted.

To the bill the defendants demurred, and on March 13, 1884, in chambers the judge of the Circuit Court heard a motion to dissolve the injunction. The decree recites that the cause came on to be heard upon the bill and exhibits, the demurrer by all the defendants except the sheriff, the motion to dissolve the injunction to the extent of the said $200, in the bill mentioned as having been paid by the plaintiff on the 17th day of August, 1881, to the defendants, and which said plaintiff in his bill insists shall be allowed

him as an offset against the judgment, the defendants admitting and conceding that the plaintiff is entitled to the benefit of the two items of costs, being $20.50 and $80.55 in the bill mentioned as credits upon or offsets against the said judgment. "Upon consideration whereof the court is of opinion and decides that the said $200 was paid under such a mistake of law, as that the said plaintiff is not entitled to relief therefor, and that he can neither recover the same directly nor have the benefit of it as an offset to said judgment; and it is therefore ordered that the said motion be sustained, and said injunction to the extent aforesaid of said $200 be dissolved, and that the said defendants be authorized to enforce the collection of the execution in the bill mentioned subject to said admitted credits of $20.50 and $80.55, and the question as to the cost of the suit is reserved to be determined at the final hearing of the cause."

From this decree the plaintiff appealed.

The decree of reference mentioned in the bill and exhibited therewith is as follows: "The subpœna in this cause having been returned executed upon the defendants, upon motion of the plaintiffs it is ordered that the cause be referred to James Withrow, one of the commissioners of this court, with instructions to take, state and report to the next term of this court an account of the administration of the defendant, Abraham McBeard, upon the estate of Martha A. Beard, deceased, showing what estate or funds belonging to said estate have come or should have come to his hands, what disbursements have been by him properly made, and what balance, if any, remains in his hands or for which he is liable, still due to the estate of his said intestate, any matter to be specially stated, deemed pertinent by himself or required by any party, but before executing this order the said commissioner shall give personal notice for ten days of the time and place when and where he will do so to all the parties or to their attorneys, which shall be equivalent to said personal notice, and the clerk of this court is directed to convene in the manner prescribed by law the creditors of said Martha A. Beard to prove their debts before said commissioner."

For a full statement of the cause, in which this order was made, reference is made to *Beard* v. *Beard*, 22 W. Va. 130. By that statement it will appear, that "the summons to answer the bill was served and a few days thereafter at the June term, 1881, without any written notice that such motion should be made, before the

necessary time had elapsed for taking the bill for confessed, the Circuit Court on motion referred the cause to a commissioner," etc.

If the plaintiffs in said suit owed the defendant, Beard, the $200, and were insolvent, as they admitted themselves to be, in the demurrer to the bill in this case filed against them by said Beard, and they were seeking to recover from him a larger amount on judgment and execution against him, he would clearly have the right to enjoin the collection to the extent of the $200. *Mattingly* v. *Sutton*, 19 W. Va. 19, and would not be turned over to an action of *assumpsit* against them to recover the $200. The question is: Did they owe him the money, and would he have been entitled to recover it in an action of *assumpsit*? It is too well settled in Virginia and in this State to now be controverted, that when one voluntarily pays money to another with full knowledge of all the facts but under a mistake of law, he cannot recover it. *Mayor of Richmond* v. *Judah*, 5 Leigh, 305; *Haigh* v. *Building Association*, 19 W. Va. 792; *Transp. Co.* v. *Sweetzer*, 25 W. Va. 434. It is also well settled, that where judgment has been recovered before a competent court, the party paying that judgment cannot recover the money in another action, while the judgment remains in force. *Brunson* v. *Bacon*, 1 Root, 210; *Morton* v. *Chandler*, 7 Me. 45; *Loring* v. *Mansfield*, 17 Mass. 394; *Carter* v. *Canterbury*, 3 Conn. 461; *Homer* v. *Fish*, 1 Pick. 439; *Peck* v. *Woodbridge*, 3 Day, 36; *Wilber* v. *Sproat*, 2 Gray, 431; *Cobb* v. *Curtiss*, 8 Johns. 470; *White* v. *Ward*, 9 Johns. 232; *Job* v. *Collier*, 11 Ohio, 422; *Reskham* v. *Brown*, 4 Humph. 174; *Broughton* v. *McIntosh*, 1 Ala. 103. It is equally well settled, that where money has been paid on a judgment, which is afterward reversed, the money so paid may be recovered. *Hosmer* v. *Barrett*, 2 Root, 156; *Duncan* v. *Kirkpatrick*, 13 S. & R. 292; *Sturgis* v. *Allis*, 10 Wend. 354; *Duncan* v. *Ware*, 5 Stew. & P. 119; *Green* v. *Stone*, 1 H. & J. 405; *Clark* v. *Pinney*, 6 Cow. 297; *Dennett* v. *Nevers*, 7 Me. 390; *Raun* v. *Reynolds*, 18 Cal. 275; *McDonald* v. *Napier*, 14 Ga. 89; *Stevens* v. *Fitch*, 11 Metc. 248; *Maghee* v. *Kellogg*, 24 Wend. 32; *Bank of the U. S.* v. *Bank of Washington*, 6 Pet. 8; *Paulling* v. *Watson*, 26 Ala. 205. The reason on which this well-settled law is founded is, that the money so paid was paid by mistake of law. The mistake of law, which authorizes the recovery of money paid thereunder, is the mistake of the party paying it. But when paid under a judgment of a competent court, until such judgment is reversed, it must be re-

garded as paid under the law; but when the judgment is reversed, it is then a nullity, and the matter stands as if no judgment had ever been rendered, and not having been paid under mistake of law by the party paying it may be recovered.

In some of the cases above cited property was levied on under executions; in some real estate was sold; in some the parties paid after judgment and before execution; in some the question was raised, whether the party who actually received the money should be sued or the plaintiff in the action or suit; in some the question arose as to what was the remedy, whether an order of restitution in the same suit or action, or a *scire facias*, or whether it could be recovered in an action of *assumpsit;* but in none of the cases was it doubted, that the party paying the money under an order, judgment or decree was entitled to recover it in some mode. In none of the cases was it paid under a decree settling the liability of the defendant and referring the cause to a commissioner for an account. In these cases the right to recover the money is not made to depend on the fact, that the party was bound to pay it to prevent his lands or goods from being sacrificed under a forced sale. The principle underlying these decisions is, that if the money has been paid by order of a court, and that order being reversed is as if it never existed, the party not having therefore paid under a mistake of law may recover his money.

To which of the foregoing class does the plaintiff belong? It cannot be pretended that he is in the second class, because the money was not paid under such a judgment or decree, as is there described. Is he protected under the third class? Did he pay his money under the operation of a decree, which has been reversed? If he did, then he did not pay it under a mistake of law and can recover it. It is clear that he did not pay it under an appealable decree. He paid it after the decree of reference and before his appearance in the suit. There was no decree rendered against him, under which payment of money could be enforced. In fact it had not yet been ascertained by the court how much he owed, or whether he owed any thing. The decree of reference settled nothing; it could not be said to have settled the principles of the cause. Such a reference under our statute could have been made in vacation. The order of reference does not pretend to decide that the defendant was liable to pay any thing to the plaintiff. The court had not yet determined to whom the personal estate of Martha A. Beard

should be distributed. The order directed the creditors to be convened, and it might be that the whole estate would be required to satisfy their demands, and that there would be nothing left to distribute. The order required the commissioner to state an account "showing what estate or funds belonging to the said estate have come or should have come to his hands, what disbursements have been by him properly made, and what balance, if any, remains in his hands, or for which he is liable, still due to the estate of said intestate," etc. There is certainly nothing here which decides that he was liable to pay any money to the plaintiffs. If the report showed it would require all the funds to pay the creditors, the plaintiffs would have received nothing. The bill, it is true, claims that there were funds in his hands, to which the plaintiffs were entitled as the distributees of defendant's intestate. But the bill was not taken for confessed, and the court did not decide, that the plaintiffs were entitled to receive any thing. Such an order could afterward be properly disregarded by the court without bill of review or motion for rehearing.

In none of the cases, which we have examined, has it been held, that where money has been paid after suit brought, it could be recovered, except in cases where it was paid after a decree or judgment requiring it to be paid had been entered by the court, and had been reversed on appeal or writ of error. We have found no case in which it has been held, that where after suit brought the money had been voluntarily paid, before a judgment was rendered requiring it to be paid, it could be recovered, even if the judgment were afterward reversed on writ of error. It seems to us, that it makes no difference, whether he paid the money before suit brought or after, if he pays it under his own decision of the law, and not under the decision of the court. In either case he pays it under a mistake of the law.

In *Brisbane* v. *Dacres*, 5 Taunt. 152, GIBBS, J., said: "The party has his option, whether to litigate the question or submit to the demand and pay the money."

In *Brown* v. *McKinnally*, 1 Esp. 279, a party who was sued for old iron sold and delivered, paid the sum demanded objecting at the time, that the iron was not such as he contracted for, but was of an inferior quality and less value, and giving notice to the vendor that payment was made without prejudice, and that a suit would be brought to recover the overplus thus paid. On his bringing such

suit Lord KENYON decided that it could not be maintained, and said that to allow it would be to try every question twice; that the same legal ground, which would entitle the plaintiff to recover in that suit, would have been a good defense to the suit brought against him by the defendant.

In *Hamlet* v. *Richardson*, 9 Bing. 644, the plaintiff had paid a certain sum of money after action brought with knowledge of the facts, on which the demand was founded, and it was held that he could not recover it.

In *Milnes* v. *Duncan*, 6 Barn. & Cres. 671, HOLROYD, J., said that money paid after legal proceedings were instituted could not be recovered, if there were no fraud in the party receiving the money. The same doctrine was recognized in *Duke de Cadaval* v. *Collins*, 4 A. & E. 858.

In *Forbs* v. *Appleton*, 5 Cush. 115, it was held that a payment of money in order to prevent the obligee in a bottomry bond from enforcing the same by taking possession of the vessel, is not a compulsory but a voluntary payment, which if the money demanded is not due does not give the debtor a right to recover it, although he declares at the time of payment that he makes it under coercion, and intends to reclaim the money by action. DEWEY, J., said: "The present case, looking at the facts agreed, seems to present nothing beyond the ordinary case of a voluntary payment of money to avoid a law-suit. The party demanding the money had not the actual possession of the vessel, which was the subject of the bottomry bond, and could not proceed further with the levy upon the same by means of any process in the nature of an execution or warrant of distress. The proceeding against the vessel, although a proceeding *in rem* and authorizing a sequestration of the vessel, was yet one easily discharged by making a deposit of money or giving proper security to pay such demand and all costs, if the same should be duly established before the proper tribunal. A threatened law-suit is not that species of duress which will authorize the party to recover back money voluntarily paid on an illegal claim."

In *Benson* v. *Monroe*, 7 Cush. 125, it appeared that a vessel arrived at Boston in 1847 with alien passengers on board; after the passengers were landed, the master refused to pay the head-money of $2 for each of one hundred and forty passengers demanded by the superintendent of alien passengers under the stat-

ute of 1837, chapter 238, section 3, which had by the Supreme Court of Massachusetts been declared constitutional and valid. Whereupon the overseers of the poor commenced a suit (under the statute, chap. 46, § 28, and statute of 1837, chap. 238, § 6) against the owners of the vessel to recover the penalty of $200 for each passenger, and attached the vessel in the sum of $30,000. The owners thereupon paid the head-money demanded and costs under protest and with notice that they intended to sue to recover it. The statute of 1837 was afterward, on writ of error to the Supreme Court of Massachusetts in the case, in which said statute was decided to be constitutional, held by the Supreme Court of the United States unconstitutional and void. 7 How. 283. It was held that the owners could not maintain an action to recover the money so paid. This seems to be a great hardship, but METCALF, J., said: "The court deem this a plain case. It is an established rule of law that if a party with full knowledge of the facts voluntarily pays a demand unjustly made on him and attempted to be enforced by legal proceedings, he cannot recover back the money as paid by compulsion, unless there be fraud in the party enforcing the claim and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests, that he is not answerable, and gives notice that he shall bring suit to recover the money back. He had an opportunity in the first instance to contest the claim at law. He has, or may have, a day in court. He may plead and make proof that the claim on him is such that he is not bound to pay."

So in this case Beard should have contested the claim before he paid a part thereof, as he did afterward; and if he had paid nothing until the court on such contest had entered a decree against him for the money, and it had then been paid, and the decree had afterward been reversed on appeal he could recover the money. But as we have seen, he did not do this, but before decree settling his liability — with a full knowledge of all the facts — he voluntarily paid the $200. He paid it under his own mistake of law, and cannot recover it. Suppose he had paid the $200 before suit was brought, and he had contested the residue, and the decree had been reversed, would it be contended that in a suit to recover the money which he had paid under the said decree, he could include the $200 paid before suit brought under a mistake of law? It does not in our opinion change the matter when he pays it after

suit brought under his own mistake of law. This is a hard case, because the plaintiffs in the former suit are not in conscience entitled to the money. But we cannot, in order to relieve the hardship, set a precedent that will unsettle authority and do vastly more harm than good. The plaintiff in this case falls within the first class; is one of those who with full knowledge of all the facts pay money under a mistake of law, and cannot therefore recover it.

The order dissolving the injunction must be affirmed.

Judgment affirmed.

SCHWARZBACH v. OHIO VALLEY PROTECTIVE UNION.

(25 W. Va. 622.)

Insurance — life — declarations of insured — warranties.

Declarations of one whose life is insured for the benefit of others, tending to contradict statements in his application and avoid the policy, are inadmissible.*

An application for life insurance warranted that the answers therein were correct and true, and declared that if any of them should be in any material respect untrue or false, or tend to deceive the insurer, the contract should be void. *Held*, a mere representation a breach of which was not fatal unless fraudulently false.†

ACTION on a life insurance policy. The opinion states the points. The plaintiff had judgment below.

H. M. Russell, for plaintiff in error.

W. P. Hubbard, for defendant in error.

GREEN, J. [Omitting other points.] The next question I will consider is: Did the court below err in refusing to permit the defendant below to prove the statements made by George Schwarzbach, the insured, prior to his application, which contradicted his statements contained in his application for this policy of insurance

* See *Union Center Life Ins. Co.* v. *Cheever* (36 Ohio St. 201), 38 Am. Rep. 573; *Mobile Life Ins. Co.* v. *Morris* (3 Lea, 104), 31 Am. Rep. 631; *Singleton* v. *St. Louis Ins. Co.* (66 Mo. 13), 27 Am. Rep. 321.

† See *Fitch* v. *Am. Pop. Life Ins. Co.* (59 N. Y. 557), 17 Am. Rep. 372.

in reference to his having had serious sickness within seven years before making this application and in reference to his having brothers and sisters? When this evidence was offered, it was not stated by the defendants below, that these statements with reference to his health had been made about the time of his application for the insurance, or that they were statements relative to his health when these statements were made, but relative to his having had serious sickness some time prior to these statements. For all that the record shows, these statements may have been made years before.

The decisions on the question of the admissibility of declarations made by the insured, when the insurance is for the benefit of others as in this case, are somewhat conflicting. In *Averson* v. *Kinnard*, 6 East, 188, it was held that in an action by a husband on a policy of insurance on his wife's life, declarations made by the wife to an acquaintance, while lying in bed in the day-time apparently ill, that she was in bad health and had been sick for some time and was sick when she went to Manchester a few days before to get a certificate of her good health preparatory to getting this policy of insurance on her life in favor of her husband, and that she was afraid she would not live ten days, when the policy would be returned, and her husband would lose the benefit of the insurance, were proper evidence to show her ill state of health, when the policy was issued. In *Kelsey* v. *Union Life Insurance Company*, 35 Conn. 225, in an action by a husband on his policy on his wife's life, letters of hers written a few days before the application was made, in which she spoke of her health as very bad, were held admissible to contradict the policy was issued, she was in bad health.

These cases were decided partly on the ground that these declarations were a part of the *res gestæ*. But the reasoning of the court in these cases and the decisions have not been approved in other cases. In *Fraternal Mut. Ins. Co.* v. *Applegate*, 7 Ohio St. 292, where the suit was on a policy on the husband's life for the benefit of his wife, it was held that the admissions of the husband, after the policy was issued, were not competent evidence against the plaintiff. The court say: "They are not the declaration of a sick person in relation to his condition at the time of making them. * * * They were not against his interest. * * * They were not the statements of one, who had been a witness in the trial, offered to impeach his credit. * * * They were therefore mere hearsay." It is evident, that had the declarations of the hus-

hand been in this case made with reference to his health at some previous time, and these declarations had been made before the policy was issued, on the reasoning of the Ohio case they would have been necessarily rejected as mere hearsay. The same views were taken in *Washington Life Ins. Co.* v. *Haney*, 10 Kans. 525, and speaking of the English and Connecticut cases before cited, the court say: "In both cases however they were considered by the courts as being so near the application as to be properly a part of the *res gestæ*. * * * While it may be doubted whether the reasons given for these two decisions are good, still they in no wise conflict with the well-settled principles, upon which other cases were and this must be decided." In accordance with these views it has been held that statements as to health made by the insured some months prior to the insurance to persons other than the company or the physician were inadmissible. *Swift* v. *Massachusetts Mut. Life Ins. Co.*, 2 Thomp. & Cook, 303; see also *Reed* v. *N. Y. C. R. Co.*, 45 N. Y. 574. So the previous declarations of the insured as to his habits have been held mere hearsay and inadmissible against the insured (*Rawles* v. *Amer. Mut. Life Ins. Co.*, 36 Barb. 357), and his statements subsequent to the issuing of the policy are equally inadmissible. 27 N. Y. 282. These authorities as well as reason lead me to the conclusion, that the court below did not err in refusing to admit any of the declarations of the insured made to third persons at or about the time the policy was issued, either as to the former state of his health, his having formerly had severe sickness, or as to his having had brothers and sisters. These declarations were all mere hearsay and cannot be used as against the plaintiffs. The insured, who made them, had no interest in the policy, most if not all these declarations having been made long before the policy was issued. Even if made afterward, they were equally mere hearsay; he never did have any interest in the policy. He was not a witness in this case, so as to permit his evidence to be thus contradicted; nor were they declarations of a sick person relative to his condition at the time of the making of these declarations.

The next important question in this case is: "What is the construction of this policy? Were all the answers made by the applicant to the questions propounded on his application warranted to be absolutely true, or could the jury consider whether the answers given, which were not true in whole or in part, were material or immaterial, and whether they tended in any way to injure

the defendant below by misleading it and inducing it to enter into a contract and issue a policy, which it might possibly have declined had true answers been given to the questions? The authorities all agree, that if by the contract and policy the applicant warranted his answers to be true in all respects, then this removes their materiality from the consideration of the jury or of the court; and if the answers are any of them untrue, though they be such as the court or jury might believe could not have prejudiced the defendant, nor in any degree influenced the defendant in entering into the contract or issuing the policy, yet the insured or person for whose benefit the policy was taken cannot recover upon it. For the parties to the contract have for themselves declared that every question and answer should be regarded as material, and an untrue answer should avoid the policy. See *Ætna Ins. Co.* v. *France*, 94 U. S. 561; *Jeffries* v. *Life Ins. Co.*, 22 Wall. 47; *Foot* v. *Ætna Life Ins. Co.*, 61 N. Y. 571; *Powers* v. *Northeast. Mut. Life Ass'n*, 50 Vt. 630; *Co-operative Association* v. *Leflore*, 53 Miss. 2 syl. 4, 5.

But in ascertaining whether the answers to questions put to the applicant are warranties or representations, it should be borne in mind that when a policy contains contradictory provisions, or is so framed as to render it doubtful whether the parties intended that the exact truth of the applicant's statements should be a condition precedent to any binding contract, the construction which imposes on the insured the obligations of a warranty should not be favored. *Nat. Bank* v. *Ins. Co.*, 95 U. S. 673. The case of *Washington Ins. Co.* v. *Haney*, 10 Kans. 525, was one in which this principle of construction was applied, and the answers of the insured were not regarded as warranted to be absolutely true.

There are in this contract and policy certain phrases, that taken by themselves, would be warranties of the absolute truth of the answers by the applicant to the questions propounded to him, whether they were material or not, while in other portions of it there are provisions which seem to qualify or contradict this warranty of the truth of these answers without regard to their materiality or the good faith with which they were made. Thus the policy says it was issued "in consideration of the representations, agreements and warranties made by the insured;" and in the application the insured says: "I hereby represent and warrant that the statements and answers above and herein made and the statements accompanying are true and correct, and I have not con-

cealed, withheld or misrepresented any material circumstance or fact of the past or present state of my health, condition or habits of life which the managers of the Ohio Valley Life Insurance Protective Union ought to be made acquainted with, or which renders me unfit for membership in said association. That these answers or statements not written by me were written on my dictation and at my request, and constitute warranties on my part." But in apparent contradiction of these sweeping phrases there follows directly afterward this language: "And if the same be in any material respect untrue or false, or tend to deceive said association, then this contract shall be void." And in the fourth clause of the policy this application containing these phrases is made a part of the policy. It may be regarded as settled that in construing a policy the courts lean in favor of the construction which makes a statement of the insured a representation rather than a warranty, and when taking the whole policy and papers referred to in it as a part of it together, it is doubtful whether the parties intended that the statements or answers of the insured should be regarded as representations or warranties, the court will construe them to be representations and not warranties. See *Wilkinson* v. *Conn. Mut. Ins. Co.*, 30 Iowa, 119; *Campbell* v. *N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Garcelon* v. *Hampden Fire Ins. Co.*, 50 Me. 580; *Hall* v. *Howard Ins. Co.*, 14 Wend. 385. Applying these rules in this case it is true that the applicant in one part of his application says: "I hereby represent and warrant the answers above are true and correct." The words by themselves constitute a warranty. But in the same application the applicant states: "If these answers and statements be in any material respect untrue or false, or tend to deceive the association, this contract shall be void." This unqualified warranty first set forth in the application of the insured immediately following the answers, and also the unqualified warranty with which this application commenced "that he did thereby declare and warrant that he was then of sober and temperate habits, in good health, of sound body and mind, and that he did usually enjoy good health, and that his age at his next birth-day was fifty-six years," are to be construed in connection with the statements contained in the latter part of this application, "if these statements and answers be in any material respect untrue or false, or tend to deceive the association, then this contract shall be void, and any benefit to other per-

sons at the death of the insured shall be forfeited to said association." When so construed, according to the rules above laid down, they convert what might have been warranties into representations, and require of us to apply the law which belongs to representations and not to warranties to this case. The law, as I understand, is that when a fact is specifically inquired about by this specific inquiry, the insurer shows that he regards this fact as material; and a misrepresentation contained in an answer to such questions avoids the contract though the court or jury may think the inquiry is not in reality material, that is that a true answer would probably have prevented the policy from issuing or if issued would have caused the premium demanded to be increased. *Miller* v. *Mut. Life Ins. Co.*, 31 Iowa, 266; s. c., 7 Am. Rep. 122; *Campbell* v. *N. E. Mut. Life Ins. Co.*, 98 Mass. 381–403. If the answer to a question is untrue the jury has no right to say that the variation from the truth is as to a matter not material. *Fitch* v. *Am. Pop. Life Ins. Co.*, 2 Thomp. & Cook, 247. But whether a particular inquiry be made as to a fact or not any statement as to a material fact which is a misrepresentation will avoid the policy. *Daniels* v. *Hudson R. F. Ins. Co.*, 12 Cush. 416. By a material fact is meant one which would probably have caused the policy not to be issued or caused a change of the terms on which it was issued."

There has been a considerable diversity of opinion as to what constitutes a misrepresentation which avoids a policy. Some hold that if the representation is materially untrue, it avoids the policy even when it is made in good faith and is the result of ignorance. *Campbell* v. *New Eng. Mut. Life Ins. Co.*, 98 Mass. 381, and *Vose* v. *Eagle Life and Health Ins. Co.*, 6 Cush. 42. But there are other cases in which it is held that a representation as to a material fact will not necessarily avoid a policy, simply because it is untrue and that in addition to its untruth its falsity must be known to the insured. *Wheelton* v. *Hardisty*, 8 El. & B. 232; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; 24 Eng. L. & Eq. 1. See also remarks of Lord MANSFIELD in *Ross* v. *Bradshaw*, 1 Wm. Bl. 313, and in *Stackpole* v. *Lenion* cited in Park Ins. 392. See also *Rawlins* v. *Desborough*, 2 Mood. & R. 328, 333; *Huckman* v. *Fernie*, 3 M. & W. 505; *Sweete* v. *Farlie*, 6 C. & P. 1. It seems to me that no particular or arbitrary rule should be applied to life policies. After a long controversy in England it may now be regarded as well settled there that to make a vendor responsible in damages for a representation,

which turns out to be untrue, it must be made *mala fide* and not in the *bona fide* belief that it is true. And this is supported by the weight of American authorities. See *Crislip* v. *Cain*, 19 W. Va. 471 and 472, where these English cases are all cited. But it should always in this connection be borne in mind that if one represents as personally known to him what is not true, though he may believe it, he has in contemplation of law acted *mala fide* and is guilty of a legal fraud though he may in point of fact have acted *bona fide;* and in such a case he is responsible for any injury resulting from his false representation. *Cabot* v. *Christie*, 42 Vt. 121; *Hammatt* v. *Emerson*, 27 Me. 308, 326; *Bennett* v. *Judson*, 21 N. Y. 238; *Stone* v. *Denney*, 4 Metc. 151; *Hazard* v. *Irwin*, 18 Pick. 95; *Fisher* v. *Mellen*, 103 Mass. 506. These cases are cited and this doctrine considered and approved in *Crislip* v. *Cain*, 19 W. Va. 491 to 493.

This doctrine has peculiar and special application to policies of life insurance, for it is obvious that most of the facts set out especially in the applications now generally attached to the policy and expressly made a part of it are facts peculiarly within the knowledge of the insured, and whether he says so or not must be regarded as stated on his own personal knowledge, and hence with reference to most facts, especially when stated in answer to questions propounded to him, he must be regarded as making them on his own personal knowledge and as being by him intended to be so understood by the insurer. This being the case, if a part of this description is untrue in point of fact, he is guilty of legal fraud, though he may not have intended to deceive, and really did not act *mala fide* in point of fact. But sometimes facts are stated by the insured, which the insurer must from the nature of the fact stated have known were not stated as facts absolutely true and within the personal knowledge of the insured. When the fact stated is of this description, on the principles we have laid down, the policy should not be avoided merely because the statements turn out afterward to be in point of fact untrue, if the statement was made in perfect good faith and with the full belief, when the statement was made, that it was true. Of this character would be a statement in an application that the insured was of "sound body;" for of course the insurer must have understood such a statement as made not upon the personal knowledge of the insured, but upon his belief from all the knowledge he had of his constitution. For of course men sometimes believe they are of "sound body," when in point

of fact they have some "internal disease," which in its character is fatal. When such a statement as this is made in an application for a life-policy on the principles we have laid down the policy is not forfeited, if the statement turns out to be untrue, if when it was made, the insured believed that he was of "sound body" and had no suspicion that he was the subject of an "internal disease" fatal in its character. If on the other hand, the insured in his application should state in answer to a question, that he had not had a serious illness for seven years, this statement the insurer must have regarded as made on his own personal knowledge; and if in point of fact it was untrue, on the principles we have stated it must forfeit the policy, though he did not make the statement in point of fact *mala fide*, that is, with a purpose of deceiving, but only from thoughtlessness or forgetfulness, or because he had forgotten that a serious illness, which he had had, was within seven years.

I apprehend that the conflict of authorities on the question, whether there must be fraud in a misrepresentation of a fact, in order to avoid a policy, has arisen principally from a failure to distinguish between actual fraud, that is, a misstatement of a fact made with the intention of deceiving, and legal fraud, which is a misstatement of a matter within the personal knowledge of the insured, or of such a character that the insured must have regarded it as within the personal knowledge of the insured. Such a misstatement of a matter of this character is a legal fraud, though it was not made with intent to deceive. And I apprehend the law to be that a misrepresentation of a fact made by the insured, whether such misrepresentation be an actual fraud or a legal fraud, will avoid a policy; but if there be an absence of all fraud, legal or actual in the misrepresentation of a fact, such misrepresentation will not avoid a policy.

KYLE v. HARVEYS.

(25 W. Va. 716.)

Assignment for creditors — provision for private sale.

A provision in an assignment for creditors that the assignee shall sell the goods at private sale does not render the assignment fraudulent on its face.

THE opinion states the point.

Simms & Enslow, for plaintiff in error.

GREEN, J. The only question arising in this case, which has been argued by counsel in this court is, whether the assignment executed by H. F. Earles to A. D. Neal, dated September 29, 1882, transferring to him a stock of goods in the town of Milton to pay two preferred creditors and then to distribute the proceeds *pro rata* amongst all the creditors of the grantor, was fraudulent on its face. Our statute of frauds provides, that "every assignment given with intent to delay, hinder or defraud creditors shall as to such creditors be void." Code ch. 74, § 1. To make an assignment void as to creditors under this statute, it is not sufficient that the effect of it is to delay or hinder creditors; for every assignment of a man's property, however good and honest the consideration, must necessarily hinder and delay his other creditors, for it diminishes the fund out of which his creditors may obtain satisfaction of their debts. But to render it void against them, it must be made with intent to delay, hinder or defraud them. *Meux* v. *Howell*, 4 East, 13; *Dance* v. *Seaman*, 11 Grat. 778. But as the law presumes every man to intend the legal consequences which must naturally flow from his voluntary acts, if on the face of an assignment there are provisions which are contrary to the public policy of the State established by statute-law or by the decisions of the court for the protection of creditors, and the effect of which is at the same time to hinder and delay creditors in a manner declared illegal by statute-law or by the decisions of the court, the law will conclusively presume that the maker of such an assignment intended to hinder and delay his creditors by the insertion of such provisions in the as-

signment; and therefore the courts as a matter of law declare such assignments fraudulent on their face, or as it is generally expressed, they are fraudulent *per se.*

Is the assignment in this case of that character? The courts in the different States of the Union have reached diverse conclusions as to what provisions may be inserted in an assignment or deed of trust for the benefit of creditors without making it fraudulent *per se.* I shall confine myself to the consideration of the provision which may be inserted in such an assignment or deed of trust as to the management and mode of selling the property assigned without making it fraudulent *per se.*

The courts of the State of New York have probably gone further than those of any other State in the Union in holding such assignments and deeds of trust fraudulent on their face because of provisions inserted in them with reference to the management and sale by the assignee of trustee or the property assigned. They appear to have reached the conclusion, that any provision inserted in such an assignment or deed of trust with reference to the management or sale of the property, which would delay the creditors of the grantor beyond the time which they would necessarily be delayed by the mere fact that the property was placed in the hands of an assignee or trustee to sell for the benefit of the creditors secured, would make the assignment or deed of trust fraudulent *per se.* As stated in *Dunham* v. *Waterman*, 17 N. Y. 9, the conclusion reached is, "that a debtor, who makes a voluntary assignment for the benefit of creditors, may direct in general terms a sale of the property and may also direct upon what debts and in what order the proceeds shall be applied; but beyond this he can prescribe no conditions whatever as to the management or disposition of the assigned property." See also *Jessup* v. *Hulse*, 21 N. Y. 168.

In accordance with this conclusion it is held in New York, that a power granted to the assignee or trustee to sell on credit made the assignment fraudulent *per se;* for this of course did delay creditors beyond the time for which they were necessarily delayed by putting their property in the hands of the assignee or trustee to be sold for the benefit of creditors. It is apparently now settled in New York accordingly, that an express power conferred on the assignee or trustee to sell the property on credit, will render the assignment or deed of trust fraudulent *per se.* *Barney* v. *Griffin*, 2 N. Y. 365, 371; *Nicholson* v. *Leavitt*, 6 N. Y. 510; *Burdick* v. *Post*, 6 N. Y. 522;

Porter v. *Williams*, 9 N. Y. 142; *Kellogg* v. *Slauson*, 11 N. Y. 302; *Brigham* v. *Tillinghast*, 13 N. Y. 215. But in reaching this conclusion older decisions were overruled. *Rogers* v. *DeForest*, 7 Paige, 272; *Nicholson* v. *Leavitt*, 4 Sandf. 252.* But it may now be regarded settled law in New York, that the giving of an express power to the assignee or trustee to sell property on credit makes the assignment or deed of trust fraudulent *per se*. *Gates* v. *Andrews*, 37 N. Y. 657; *Morrison* v. *Brand*, 5 Daly, 40; *Rapalee* v. *Stewart*, 27 N. Y. 310. And this conclusion seems to be a necessary consequence of what is regarded as the public policy of the State of New York with reference to the protection of creditors against delays in the collection of their debts by the act of the debtor. The fact that such a provision was made by the debtor in good faith to prevent a sacrifice of the property will make no difference. In accord with these views it was decided in *Dunham* v. *Waterman*, 17 N. Y. 9, that a provision in the assignment or deed of trust, that the assignee or trustee might continue the business of an iron foundry, though intended as a means of realizing the trust fund, and with a view merely of winding up the business, would render the assignment or deed of trust fraudulent *per se*. As a matter of course when the public policy is such as is indicated by these decisions, a direction contained in an assignment, that the assignee should retail property on credit, would render the assignment fraudulent *per se*. *Meacham* v. *Stearns*, 9 Paige, 398. But these extreme views even the courts of New York have been compelled to modify or evade. It was usual in that State and others to insert in such assignments or deeds of trust a provision, that the assignee or trustee should sell and dispose of the property "upon such terms and conditions as in his judgment he should think best and most to the interest of the parties concerned." It would seem very obvious, that a clause thus worded would authorize a sale on credit, and according to these New York decisions render the assignment or deed of trust fraudulent *per se*. It was accordingly so held in *Lyon* v. *Platner*, cited in *Woodburn* v. *Mosher*, 9 Barb. 255, but not reported. The court also, in *Moir* v. *Brown*, 14 Barb. 39, thought such a clause certainly gave a power to sell on credit, and in *Schufeldt* v. *Abernethy*, 2 Duer 533, the court held that these words by necessary implication gave a discretionary power to the assignee to sell upon credit, and it therefore rendered the assignment on its face fraudulent and void.

* Reversed, 6 N. Y. 510.—Rep.

But the Court of Appeals of New York and the Supreme Court of this State being as it seems to me, unwilling to carry out to their full extent the views which they had expressed, that any discretion expressly conferred on the assignee as to the mode or terms of sale would render an assignment fraudulent and void on its face, have held that such a clause, as we have quoted above, did not authorize the assignee or trustee to sell on credit. See *Whitney* v. *Krows*, 11 Barb. 198; *Southworth* v. *Sheldon*, 7 How Pr. 414; *Kellogg* v. *Slauson*, 15 Barb. 56; s. c., 11 N. Y. 302; *Nichols* v. *McEwen*, 21 Barb. 65; s. c., 17 N. Y. 22. In *Clark* v. *Fuller*, 21 Barb. 128, words empowering the assignee to sell, and providing the sale might be made "in such manner as he shall deem best and most for the interest of the parties concerned," were held not to render the assignment fraudulent *per se*, because they did not authorize a sale on credit. And in *Bellows* v. *Patridge*, 19 Barb. 176, the court, as if to avoid the consequences of holding every deed or assignment void and fraudulent on its face, which authorized a sale on credit, actually held that when the assignment authorized the assignee "to convert the assigned property into money by sale either public or private as soon as practicable with due regard to the rightful interests of all the parties concerned, and in such a manner as might in the judgment of the assignee be for the best interest of the estate." it was not void and fraudulent *per se*, because the power which was intended to be given was only a "rightful" or "lawful" power, and that if a power to sell on credit was not lawful, no such power was given. In *Brigham* v. *Tillinghast*, 13 N. Y. 220, the court concludes its opinion thus: "The true rule to be observed is this: An insolvent debtor may make an assignment of all his estate to trustees to pay his debts with or without preferences; but such assignees are bound to make an immediate application of the property, and any provision contained in the assignment, which shows that the debtor at the time of the execution intended to prevent the immediate application, will avoid the instrument, because it shows it was made with intent to hinder and delay creditors in the collection of their debts, such an intent expressed in the instrument or proved *aliunde* is fatal alike by the language of our statute and the well-settled adjudication of the English and American courts."

The objection to this reasoning which at once presents itself is that every assignment or deed of trust necessarily hinders and delays creditors, and is made generally with the avowed intent of

delaying and hindering them, and yet neither in New York nor anywhere else is such an assignment or deed of trust fraudulent and void if made with an honest purpose, such as preferrring creditors, and if it contains no provisions deemed contrary to public policy. The reasons here assigned for holding an assignment fraudulent and void as to creditors would render every assignment for the benefit of creditors fraudulent; and this is not sustained by any decisions either American or English.

I have reviewed these New York cases in reference to what provisions in an assignment for the benefit of creditors with reference to the management and sale of the property assigned would make a deed fraudulent as to creditors, because the New York cases have been the principal cases relied upon by the defendant in error, and because they have had great influence on the decisions in the various States of this Union, especially of many of the Northern States, though as we shall presently see, they have not been so generally followed in the decisions in the Southern States. These decisions in reference to the effect in rendering fraudulent on its face an assignment for the benefit of creditors of a provision authorizing the assignee to sell the property on credit have been followed in Michigan, *Booth* v. *McNair*, 14 Mich. 19; Minnesota, *Greenleaf* v. *Edes*, 2 Minn. 264; *Truitt* v. *Caldwell*, 3 Minn. 364; Illinois, *Pierce* v. *Brewster*, 32 Ill. 268; *Bowen* v. *Parkhurst*, 24 Ill. 257; Vermont, REDFIELD, J., in *Mussey* v. *Noyes*, 26 Vt. 462, 470; BENNETT, J., in *Page* v. *Olcott*, 28 Vt. 465, 468, 469, and Wisconsin. *Hutchison* v. *Lord*, 1 Wis. 286; *Haines* v. *Campbell*, 8 Wis. 187. The New York case of *Dunham* v. *Waterman*, 17 N. Y. 9, receives, it may be supposed, some support from the case of the *Exchange Bank* v. *Inloes*, 7 Md. 391, though as we shall hereafter see, this case is really based upon different principles.

But even in States where there has been shown a disposition to follow the New York decisions, they depart from the fundamental principles on which, as I conceive, the New York cases I have cited are based — that is, that in providing for the management and sale of the property assigned no provisions can be made in the assignment which will delay creditors beyond what necessarily results from the property being placed in the hands of trustees for the purpose of paying creditors of the grantor; and therefore a debtor who makes a voluntary assignment for the benefit of creditors may direct in general terms a sale of the property, and may

also direct upon what debts and in what order the proceeds shall be applied, but beyond this he can prescribe no conditions whatever as to the management or disposition of the assigned property.

Now it has been very generally held even in States which generally follow the New York decisions that when, as in the case before us, the property of the debtor is insufficient to pay his debts, the desire to protect it from sacrifice and have it realize as much as possible is not inconsistent with fair dealing and honesty, and instead of violating the policy of the law or the rights of creditors, is in harmony with both and exempt from the charge of fraud. *Angell* v. *Rosenbury*, 12 Mich. 241, syl. and p. 264; *Burt* v. *McKinstry*, 4 Minn. 215; *Guerin* v. *Hunt*, 8 Minn. 490. Even in New York I find no cases controverting these views; but on the contrary I find cases supporting them. *Ely* v. *Cook*, 18 Barb. 614; *Ogden* v. *Peters*, 15 Barb. 564. I have been able to find no expressions of opinion anywhere to the contrary of these views except in a single instance in *Vernon* v. *Martin*, 8 Dana, 171, of first edition. Page 264 of second edition, Judge EWING says: "When it appears on the face of a deed of trust the motive of making it was to prevent a sacrifice of the property, a bad motive is shown and a motive to obstruct the ordinary process of law in the subjection of property to the payment of debts, which vitiates the whole deed; and so if the motive and intention be proved *aliunde*." When however this is read in connection with the balance of Judge EWING'S opinion, the fair inference is not that the deed would be necessarily vitiated by a provision which was inserted to prevent the sacrifice of the property, for in that case he upheld the deed as valid and not fraudulent, though there was in it a provision evidently intended by the grantor to prevent a sacrifice of the property, the provisions being for selling by retail of the stock of goods conveyed. All that Judge EWING probably meant by what is above quoted is, that the deed would be vitiated and would be fraudulent if the only motive the grantor had in making the deed at all was not to secure creditors, but simply to prevent his property from being sacrificed by a sale under execution. These cases however show that when by the manner of the sale there appears on the face of the deed an intent to prevent the property from being sacrificed, when the property conveyed was sufficient to pay all the debts, so that the creditors could not be benefited by the delay thus produced, but only the debtor to whom the surplus would be coming,

then such provision would be fraudulent and would vitiate the deed. I need express no opinion on this last point, as the property in this case appears on the face of the deed to be insufficient to pay all debts.

The decisions above cited are reconcilable with the fundamental basis of the New York cases which we have before cited. For if the principles laid down in them were followed, any provision in the assignment which in order to prevent a sacrifice of the property provided any other mode of sale than a public sale for cash would make the deed fraudulent on its face; but the reverse was held in these cases.

Applying these to the case before us the property of the debtor, W. T. Earles, being as appeared on the face of the assignment of September 24, 1882, insufficient to pay his debts, the effort to protect it from sacrifice by the insertion of the provision that the assignee, Neal, should sell the goods transferred at private sale was not inconsistent with fair dealing and honesty, and instead of violating the policy of the law or the rights of creditors, it is in harmony with both and exempt from the charge of fraud. This is the only provision in this assignment which it is claimed by the counsel for the defendant in error renders it fraudulent on its face.

[Other matters omitted.]

Reversed and remanded.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

DIETRICH v. NORTHAMPTON.

(138 Mass. 14.)

Statute — "person" — prematurely born child.

Where a woman, four or five months pregnant, fell on a defective highway, and was delivered of the child which survived but a few minutes, the child was not a "person" within the statute giving a cause of action for negligent death to the administrator.

ACTION for negligent killing of child. The opinion states the case. The plaintiff had judgment below.

D. Hill & J. A. Wainwright, for plaintiff.

T. G. Spaulding, for defendant.

HOLMES, J. The mother of the deceased slipped upon a defect in a highway of the defendant town, fell and has had a verdict for her damages. At the time she was between four and five months advanced in pregnancy, the fall brought on a miscarriage and the child although not directly injured, unless by a communication of the shock to the mother, was too little advanced in fœtal life to survive its pre-

mature birth. There was testimony however based upon observing motion in its limbs that it did live for ten or fifteen minutes. Administration was taken out and the administrator brought this action upon the Pub. Stats., chap. 52, § 17, for the further benefit of the mother in part or in whole as next of kin. The court below ruled that the action could not be maintained; and we are of opinion that the ruling was correct.

The plaintiff founds his argument mainly on a statement by Lord Coke which seems to have been accepted as law in England, to the effect that if a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder. 3 Inst. 50; 1 Hawk. P. C., chap. 31, § 16; 1 Bl. Com. 129, 130; 4 Bl. Com. 198; *Beale* v. *Beale*, 1 P. Wms. 244, 246; *Burdet* v. *Hopegood*, 1 P. Wms. 486; *Rex* v. *Senior*, 1 Moody C. C. 346; *Regina* v. *West*, 2 C. & K. 784; s. c., 2 Cox C. C. 500. We shall not consider how far Lord Coke's authority should be followed in this Commonwealth if the matter were left to the common law, beyond observing that it was opposed to the case in 3 Ass., pl. 2; s. c., Y. B. 1 Ed. III. 23, pl. 18; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterward cited as law by Lord Hale. Fitz. Abr., Enditement, pl. 4; Corone, pl. 146; Bro. Abr. Corone, pl. 68; 1 Hale P. C. 433.

For even if Lord Coke's statement were the law of this Commonwealth the question would remain whether the analogy could be relied on for determining the rule of civil liability. Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. Abbrev. Plac. 26, col. 2 (2 Joh.) Lincoln rot. 3; Fleta I. chap. 35, § 3, and Sir Samuel Clarke's note citing 45 H. III. rot. 22. Which again others denied; 1 Britton (Nichols' ed.), 114. See Abbrev. Plac. 295, col. 2 (29 Ed. I.) North. rot. 43. Kelham's Britton, 152, n. 14. But no case so far as we know has ever decided that if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment.

If it should be argued that an action could be maintained in the case supposed, and that on general principles an injury transmitted from the fœtus to a person through his own organic substance or through his mother before he became a person, stands on the same

footing as an injury transmitted to an existing person through other intervening substances outside him, the argument in this general form is not helped but hindered by the analogy drawn from Lord Coke's statement of the criminal law. For apart from the question of remoteness the argument would not be affected by the degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act. Whereas Lord Coke's rule requires that the woman be quick with child, which as this court has decided means more than pregnant, and requires that the child shall have reached some degree of quasi independent life at the moment of the act. *Commonwealth* v. *Parker*, 9 Metc. 263; *State* v. *Cooper*, 2 Zabr. 52.

For the same reason this limitation of criminal liability is equally inconsistent with any argument drawn from the rule as to devises and vouching to warranty, which is laid down without any such limitation, and which may depend on different considerations. Co. Lit. 390 a, and cases cited. *Reeve* v. *Long*, 1 Salk. 227; *Scatterwood* v. *Edge*, 1 Salk. 229; *Harper* v. *Archer*, 4 Sm. & M. 99.

If these general difficulties could be got over, and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person, recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator. *Marsellis* v. *Thalhimer*, 2 Paige, 35; *Harper* v. *Archer*, *ubi supra*; 4 Kent. Com. 249, n. (b.) And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally while still alive *en ventre*. *Lutterel's* case, stated in *Hale* v. *Hale*, Prec. Ch. 50; *Wallis* v. *Hodson*, 2 Atk. 114, 117. See *Musgrave* v. *Parry*, 2 Vern. 710. And perhaps not by showing that such an infant was within the protection of the criminal law. Compare 2 Savigny, System des heutigen Römischen Rechts, Beylage III.

The Pub. Stats., chap. § 9 (Stat. 1845, chap. 27, seemingly suggested by *Commonwealth* v. *Parker*, *ubi supra*), punish unlawful attempts to procure miscarriage, acts which of course have the death of the child for their immediate object; and while they greatly in-

crease the severity of the punishment if the woman dies in consequence of the attempt, they make no corresponding distinction if the child dies, even after leaving the womb. This statute seems to us to shake the foundation of the argument drawn from the criminal law, and no other occurs to us which has not been dealt with.

Taking all the foregoing considerations into account, and further, that as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning; and have not found it necessary to consider the question of remoteness or the effect of those cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common-law liability for negligence. *McDonald* v. *Snelling*, 14 Allen, 290, 292; *Boston & Albany Railroad* v. *Shanly*, 107 Mass. 568, 578. See also *Jenks* v. *Wilbraham*, 11 Gray, 142; *Bemis* v. *Arlington*, 114 Mass. 507, 509.

Exceptions overruled.

Mutual Life Insurance Company v. Allen.

(138 Mass. 24.)

Insurance — life — assignment.

A policy of life insurance issued to one having an insurable interest may be assigned to another having no interest.*

BILL of interpleader to determine right to insurance money. The opinion states the point.

J. F. Colby, for Allen.

W. S. Slocum, and *W. F. Slocum*, for Mrs. Fellows.

W. Allen, J. The contract of insurance was made and was to be performed in this State, and the money due upon it has been paid in the court here, and the contract of assignment was made in

* See *Currier* v. *Continental Life Ins. Co.*, *ante*, 134.

this State between parties domiciled here. The validity and effect of the assignment, and the capacity of the parties to it must be governed by the laws of this State. The only question which requires discussion is, whether by that law the assignment is void for want of interest of the assignee in the life insured.

The policy, in consideration of an annual premium to be paid by Mrs. Fellows, assured the life of her husband for her sole use, and for her children if she should not survive her husband. The promise was to the assured, her executors, administrators, and assigns. The policy contained no reference to an assignment except the following: "N. B. If assigned, notice to be given to this company." The policy was issued in 1855. In 1881, an assignment in the words following, signed by Mrs. Fellows, her husband and children (who were all of age), was indorsed upon the policy: "I hereby assign, transfer, and set over unto George Allen, of Boston, all my right, title, and interest in and to the within policy of life insurance, and all right that may at any time be coming to me thereon."

A more formal instrument of assignment with a power of attorney to receive "all sums of money that may at any time hereafter be or become due and payable to us, or either of us, by the terms of said policy," was also executed by the same parties. The policy and assignments were delivered to the defendant Allen, and notice thereof given to the plaintiff. The consideration of the assignment was the payment of a sum of money by the assignee, and the discharge of certain notes held by him against Mr. Fellows. It is to be assumed, on the report, that the transaction was not in the intention of the parties a wagering contract, but an honest and *bona fide* sale of the equitable interest in the policy. The defendant Allen had no insurable interest in the life of Mr. Fellows except as his creditor, and that interest ceased when he ceased to be a creditor by accepting the assignment in satisfaction of his debt, so that he is in the position of a *bona fide* assignee of the policy for valuable consideration without interest in the life insured, and the question between him and the assignor is, which has the equitable interest in the policy.

The policy is a common form of what is called life insurance, and is a contract by which the insurer, in consideration of an annual payment to be made by the assured, promises to pay to her a certain sum upon the death of the person whose life is insured. To prevent this from being void, as a mere wager upon the continuance

of a life in which the parties have no interest except that created by the wager itself, it is necessary that the assured should have some pecuniary interest in the continuance of the life insured. It is not a contract of indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue, and if made in good faith for the purpose of providing against a possible loss, and not as a cloak for a wager, is sustained by any interest existing at the time the contract is made. See *Loomis* v. *Eagle Ins. Co.*, 6 Gray, 396, and *Forbes* v. *American Ins. Co.*, 15 Gray, 249. Mrs. Fellows had an insurable interest in the life of her husband, and the policy to her was a valid contract to pay the sum insured to her upon the event of his death. This contract was a chose in action assignable by her. *Palmer* v. *Merrill*, 6 Cush. 282.

The policy was not negotiable, and her assignment could not in this State pass the legal, but only the equitable interest in the contract. The assignment was a contract between her and her assignee, to which the insurer was not a party. It purported to give to the assignee only the equitable interest of the assignor in the contract —the right to recover in the name of the assignor the sum which should become due to her under the contract.

The direction in the policy, that notice of an assignment of it should be given to the insurer, had no effect upon the character of the assignment, however its operation might have been limited had notice not been given. The assent of the insurer to the assignment would not make a new contract of insurance. Its only effect would be to enable the assignee to enforce in his own name, instead of the name of the assignor, the rights she held under the contract. *McCluskey* v. *Providence Washington Ins. Co.*, 126 Mass. 306.

This distinction between the assignment of the interest of the insured in a policy, which is a contract between the assignor and the assignee only, and the transfer or renewal to a third person of a policy, which is a contract to which the insurer is a party, is illustrated in the case of fire insurance. That is strictly a personal contract of indemnity to the assured, and he, or his assigns in his name, can recover only an indemnity for actual loss to him. If he has no interest in the property insured at the time of the loss, he can recover nothing, and if he parts with his interest before a loss, he becomes incapacitated to recover upon the policy, and it ceases to insure any thing and becomes void. *Wilson* v. *Hill*, 3 Metc. 66.

It follows that where a purchaser of insured property would have the benefit of an unexpired term of insurance, it must be by a new contract with the insurer, and not by assignment from the insured. This is usually provided for in the policy, so that by its terms an assignment by the insured with the assent of the insurer will continue the policy to the purchaser; but in such a case there is a new contract of insurance with the purchaser upon his newly acquired interest, and he becomes the assured. But the assured in a fire policy can, while his insurance continues, assign his rights under the policy in the same manner as the insured in a life policy can do. In *Fogg* v. *Middlesex Ins. Co.*, 10 Cush. 337, Chief Justice SHAW says, after referring to the kind of transfer just mentioned: "But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a chose in action; it is this: 'In case of loss pay the amount to A. B.' It is a contingent order or assignment of the money should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because upon notice of the assignment the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie* in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee with the consent of the insurers." See also *Phillips* v. *Merrimack Ins. Co.*, 10 Cush. 350.

If Mrs. Fellows had surrendered or forfeited her policy, and the contract between her and the insurer had become null, a new contract, by which the defendant Allen should have become the assured instead of Mrs. Fellows, might have required an insurable interest in him, though in the form of an assignment and a renewal or revival of the original policy. But the original policy has not been surrendered or forfeited, nor the contract in any way changed. Mrs. Fellows is still the assured, and the policy is supported by her interest in the life, and is in form payable to her. If the assignment is valid it is payable to her in trust for the assignee; if void,

for her own use. In no respect can the assignment affect the validity of the contract of insurance or taint that as a wagering policy. The only question that can be raised is as to the assignment itself — whether as between the parties to it, it is void as a gaming contract.

That a right to receive money upon the death of another is assignable at law or in equity will not be questioned. The right of Mrs. Fellows under our law to assign the equitable interest in the policy in question is not denied; but it is contended that she can assign it only to some one who has an insurable interest in the life of Mr. Fellows. We find no reason for this exceptional limitation in the right of assignment which would allow Mrs. Fellows to assign her policy to Mr. Fellows, or his creditors or dependent relatives, but would forbid her to pledge it for her own debts, or sell it for her own advantage. If there is any such reason it must be found in the contract of assignment itself, and irrespective of the rule that the original contract must be supported by an interest in the life insured. That rule was satisfied. Whether a similar rule affects the contract between the assignor and the assignee must depend upon considerations applicable to that contract alone.

One objection urged is that it gives to the assignee an interest in the death of the person whose life is insured, without a counterbalancing interest in his life. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow and is not true that the law does not allow the possession and assignment of such expectations, nor that an insurable interest is not required in a life insurance for the purpose of protecting the life insured. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will as to the assignment of a like provision in the form of a life insurance.

The other objection urged is that such transactions may lead to gaming contracts. This does not meet the question, which is whether such an assignment is in itself illegal as a wagering contract. Most contracts have an element of gambling in them. There is uncertainty in the value of any contract to deliver property at a future day, and great uncertainty in the present value of an annuity for a particular life, or of a sum payable in the event of a particular death, and such contracts and rights are often used for gambling purposes. The question is whether the right to a

sum of money, payable on the death of a person under a contract in the form of an insurance policy, has any special character or quality which renders it less assignable than the right to a sum payable at the death of the same person under any other contract or assurance, or than a remainder in real estate expectant on such death. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and we are of opinion that an assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gaming risk between him and the assignee, or a cover for a contract of insurance between the insurer and assignee, will pass the equitable interest of the assignor; and that the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal.

In England the question was raised whether the assignment of a life insurance without interest was prohibited by the Stat. of 14 Geo. III. chap. 48, which forbids any insurance on the life of a person in which the person for whose benefit the insurance is made has no interest, or by way of gaming or wagering, and it was held that such an assignment was valid. *Ashley* v. *Ashley*, 3 Sim. 149. SHADWELL, V. C., said, "It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured." The same has been held in New York where a similar statute exists. *St. John* v. *American Ins. Co.*, 13 N. Y. 31; *Valton* v. *National Fund Assur. Co.*, 20 N. Y. 32. It has been decided in New York that insurance on a life in which the assured has no interest is void at common law and that the Stat. of 14 Geo. III. chap. 48, so far as it prohibits such insurance, is a declaratory act. *Ruse* v. *Mutual Benefit Ins. Co.*, 23 N. Y. 516. In Rhode Island, in a well-considered case, decided in 1877, a sale and assignment of a policy of life insurance to one who had no interest in the life, made not as a contrivance to circumvent the law, but as an honest and *bona fide* transaction, was held valid. *Clark* v. *Allen*, 11 R. I. 439; S. C., 23 Am. Rep. 496. In *Cunningham* v. *Smith*, 70 Penn. St. 450, a person took out an insurance on his own life and paid for it with the money of the defendants, intending to assign the policy to the defendants, and did so assign it. The assignment was sustained. The court say that the defendants may have had such an

interest in the life insured as would have entitled them to insure his life in their own name, although this was doubtful; but that the assured had an interest in his own life, "and if he was willing to insure himself with their money and then assign the policy to them, there is no principle of law which can prevent such a transaction." This transaction is obviously more open to objection than the assignment of the interest in a valid subsisting policy. In *Etna Ins. Co.* v. *France*, 94 U. S. 561, a brother procured an insurance on his life for the benefit of his married sister, who was in no way dependent upon him. It was held to be valid and that it was immaterial what arrangement was made between them for the payment of the premium. In delivering the opinion of the court, Mr. Justice BRADLEY, referring to the case of *Connecticut Ins. Co.* v. *Schaefer*, 94 U. S. 457, in which he delivered the opinion, said: "Any person has a right to procure an insurance on his life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation."

Several cases have been cited as deciding that any assignment of a life policy to one who has no interest in the life is void. We will notice them briefly. *Cammack* v. *Lewis*, 15 Wall. 643, and *Warnock* v. *Davis*, 104 U. S. 775, were both cases in which the policies were taken out by the procurement of the assignees, in order that they might be assigned to them, under such circumstances as that they might well be held to be in evasion of the law prohibiting gaming policies. The remark of Mr. Justice FIELD in the latter case, that "the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name," was not necessary to the decision. In *Franklin Ins. Co.* v. *Hazzard*, 41 Ind. 116; S. C., 13 Am. Rep. 313, the assured had failed to pay the premiums, and had notified the insurers that he should not keep up the policy. He afterward assigned it for $20, the insurer assenting and receiving the premiums. The assignment was held void, the court saying that such policies are assignable, but not "to one who buys them merely as matter of speculation without interest in the life of the assured." Neither of these cases decides, whatever dicta may have accompanied the decision, that all assignments without interest are illegal. The case last cited is affirmed in the case of *Franklin Ins.*

Co. v. *Sefton*, 53 Ind. 380, in which Chief Justice WORDEN, quoting from the opinion of the court in *Hutson* v. *Merrifield*, 51 Ind. 24, that "the party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action," says that it is not stated that it is assignable to a person incapable of receiving an assignment; and adds, "It may be added that where the policy holder dies before the death of the party whose life is insured, perhaps the administrator of the holder could, for the purpose of converting the assets into money and settling up the estate in due course of law, sell the policy to any one who might choose to become the purchaser."

Missouri Valley Ins. Co. v. *Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 761, assumes and decides that the same objections lie to an assignment without interest as to an original insurance with no interest. The distinction between the two transactions is not considered. *Basye* v. *Adams*, 81 Ky. 368, seems to decide, on the authority of *Warnock* v. *Davis*, *Cammack* v. *Lewis*, *Franklin Ins. Co.* v. *Hazzard*, and *Missouri Valley Ins. Co.* v. *Sturges*, *ubi supra*, that an assignment without interest is void as against public policy.

The case of *Stevens* v. *Warren*, 101 Mass. 564, decided in 1869, has been supposed to hold that an assignment of the right of the assured in a life policy to one who has no interest in the life, is void without regard to the circumstances and character of the particular transaction, and has been referred to in some of the cases just cited as an authority to that effect. We think that decision has been misunderstood, and that in connection with other decisions of this court, it shows that the law in this Commonwealth accords with that laid down in *Clark* v. *Allen*, *ubi supra*.

In *Campbell* v. *New England Ins. Co.*, 98 Mass. 381, decided in 1868, a policy was taken out by one Andrew Campbell on his own life, and payable to himself and his representatives for the benefit of the plaintiff, who had no insurable interest in the life. The question of the right of the plaintiff to sue in her own name was waived, and the question considered was whether the policy could be supported for her benefit. In delivering the opinion of the court Mr. Justice WELLS says: "It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not,

by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract (so long as it remains executory), the interest by which it is supported, and the relation of membership, all continue the same as if no such clause were inserted. It was not necessary therefore that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured."

The question in *Stevens* v. *Warren*, which was decided about a year later, and in which the opinion is given by the same justice, was between the representatives of the assured and of his assignee. The terms, consideration, and circumstances of the assignment are not stated; it is only said that the defendant Warren claimed by virtue of an assignment of the policy, and that he was a purchaser of it, and had no interest in the life insured. The policy contained a provision that any assignment of it without the assent of the insurers should be void. The court held that the assignee acquired no rights under the assignment as against the representatives of the assignor, putting the decision upon both the grounds, that the assignment was prohibited by the contract of insurance, and that it was against the policy of the law against gambling policies. The court said: "The insurers are entitled to the full benefit of such a provision, as a matter of contract; and as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision." In considering one branch of the case, the following language is used: "The rule of law against gambling policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured." That this language was not intended to apply to all assignments in which the assignee had no interest in the life, but to such only as were found or appeared to be in fact gaming transactions, is evident from what immediately follows in the opinion, in which the doctrine of *Campbell* v. *New England Ins. Co.* is adopted, and applied to assignments: "When the contract between the assured and the insurer is 'expressed to be for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. The same would probably be held in case of an assign-

ment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured. And if it should appear that the assignment was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The assent of the insurer, if not required in the policy, must be immaterial as regards the validity of the transaction between the assignor and the assignee. If given, it would only enable the assignee to assert in his own name, instead of that of the assignor, the rights acquired by the assignment. So far as the transaction itself, apart from the circumstances attending it, is concerned, taking out a policy payable to a stranger would seem more open to objection, as a gambling transaction, than selling a policy which had acquired an actual value. As the circumstances of the transaction are not disclosed in the report, they must be supposed to have been such as to call for the decision and the remarks which were applied to them in the application of the principle laid down.

In *Palmer* v. *Merrill, ubi supra,* where the subject of assignments of the interest in a life insurance is elaborately considered by Chief Justice SHAW, there is no suggestion that any interest of the assignee in the life is necessary to support the assignment, but it is considered as an ordinary assignment of a chose in action.

In *Troy* v. *Sargent,* 132 Mass. 408, it was held that the interest of a wife in a policy to her husband on his life, for her benefit, could be taken for a joint debt of herself and husband. Could it not be taken for her sole debt, although the creditor would have no interest in the life insured? A policy of life insurance is assets which pass to an assignee in bankruptcy, and can be reached by creditors. Is it necessary, when sold by the assignee or creditor, that the purchaser should have an interest in the life insured?

The general rule laid down in *Stevens* v. *Warren, ubi supra,* "that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life," and from which the inference that an assignee of a party must have an insurable interest seems to have been drawn, we think, is not strictly accurate, or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy, but it

is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease, the policy would continue, and the insured would then have an insurance without interest. *Dalby* v. *India & London Assur. Co.*, 15 C. B. 365, and *Law* v. *London Policy Co.*, 1 Kay & Johns. 223, cited in *Loomis* v. *Eagle Ins. Co.*, 6 Gray, 396; *Connecticut Ins. Co.* v. *Shaefer, ubi supra; Rawls* v. *American Ins. Co.*, 27 N. Y. 282; *Provident Ins. Co.* v. *Baum*, 29 Ind. 236. The value and permanency of the interest is material only as bearing on the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception, it will not be avoided by the cessation of the interest. The mere fact that the assured himself has no interest in the life does not avoid or annul the policy.

We think that the second ruling was correct, and that the fact that the assignee had no insurable interest in the life does not avoid the assignment. It is one circumstance to be regarded in determining the character of the transaction, but is not conclusive of its illegality.

Decree for the defendant Allen.

SWAN v. HAMMOND.

(138 Mass. 45.)

Will — revocation by marriage — statute.

Under a statute prescribing the modes of revoking a will, and recognizing revocation "implied by law from subsequent change in the condition or circumstances of the testator," a woman's will is revoked by her subsequent marriage.*

PROBATE of will. The opinion states the case.

E. F. Dewing, & G. L. Sleeper, for appellant.

W. B. Gale & W. N. Mason, for executrix.

COLBURN, J. It appears by the record and agreed facts in this case, that Susan E. Haven, an unmarried woman, made her will, May 20, 1853; that she was then possessed of real and personal

* See *Fellows* v. *Allen* (60 N. H. 439), 49 Am. Rep. 328, and note, 329.

estate, all of which by her will she devised and bequeathed to her sister, who was named as executrix; that on October 3, 1861, she married Thomas F. Hammond, and lived with him until her death on January 18, 1883. Her husband had no knowledge of the existence of the will until after her decease. No child was born of the marriage. The will was presented for probate in Middlesex, by the executrix therein named, and was approved and allowed on April 3, 1883, and the husband appealed. The only question presented is whether the will was revoked by the marriage.

It has been well settled at common law, at least since *Forse and Hembling's* case, decided in 1589, 4 Rep. 60 *b*, that the marriage of a *feme sole* revokes her will. In case of a man it is equally well settled that marriage alone does not revoke his will, and that marriage and the birth of a child do. 1 Jarm. Wills, 122; *Warner* v. *Beach*, 4 Gray, 162.

The reason why the will of a *feme sole* is revoked by her marriage is commonly stated to be, that marriage takes away her testamentary capacity, and destroys the ambulatory nature of her will; and it is urged in argument, that since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a *feme sole* is revoked by marriage, no longer exists, and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why in the case of a man both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious.

Marriage alone in the case of a man or woman would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that since testamentary capacity has been given

to women, a will made by a woman when sole should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be, that in case of a man, his will should be revoked by marriage alone. But such a rule can only be introduced by the legislature. In England, by the Stat. of 7 Will. IV & 1 Vict., chap. 26, § 18, and in many of the States in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. See collection of statutes in 1 Jarm. Wills (5th Am. ed. by Bigelow), 122, note.

But we are of opinion that the question now before us has been so far settled by statute as not to admit of change by construction. Section 8 of the Public Statutes (chap. 127), after providing that no will shall be revoked unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not apparent that an entire revocation by implication of law results from any change of condition or circumstances, except that of a subsequent marriage. See the discussion in *Warner* v. *Beach, ubi supra.* This clause as to implied revocations was first introduced in the Revised Statutes, chap. 62, § 9. The other provisions as to revocation were substantially taken from Stat. 1783, chap. 24, § 2. The commissioners in their note to this section say, "The clause as to implied revocations recognizes and adopts the existing law as established and understood among us." And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that in case of a man, marriage and the birth of a child and in case of a woman, marriage alone, revoked a will previously made.

We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule in the case of a woman no longer exists. This was the view taken in *Brown* v. *Clark*, 77 N. Y. 369, upon a similar question under a statute of New York.

We are therefore of opinion that the will of Susan E. Hammond was not properly admitted to probate.

Decree of Probate Court reversed.

MATHER v. AMERICAN EXPRESS COMPANY.

(128 Mass. 55.)

Damages — carrier — loss of architect's plans.

In an action against a carrier for the loss of an architect's plans for a house, there can be no recovery for the consequent delay in constructing the house, where the carrier had no notice of the nature or intended use of the contents of the package.

ACTION for loss of a package in transportation. The opinion states the point. The plaintiff had judgment below.

D. W. Bond, for defendant.

J. C. Hammond, for plaintiff.

FIELD, J. It is not denied that the defendant is liable in damages for the reasonable cost of the new plans, and for other expenses if there were any reasonably incurred in procuring the new plans; but it is denied that the defendant is liable in damages for the delay in constructing the house occasioned by the loss of the plans. It is assumed that the plans had no market value, and were only useful to the plaintiff. The rule of damages then is their value to the plaintiff. As new plans could not be bought in the market ready made, some time necessarily must be consumed in making them, and the plaintiff contends that the value of the plans for immediate use, or for use at the time he would have received them from Boston, if the defendant had duly performed its contract, is their value to him, and that this value is made up of the cost of procuring the new plans and the damages occasioned by the delay. Whatever he calls it, it is damages for the delay in constructing the house caused by the loss of the original plans that he seeks to recover. It does not appear that the defendant had notice of the contents of the package at the time it was delivered for transportation, or any notice or knowledge that the plaintiff needed the plans for the construction of a house which he had begun to build. The damages caused by the delay are not such as usually and naturally arise solely from a breach of the contract of the defendant to carry the package safely to its destination, nor were they within the reasonable contemplation of both parties to

this contract as likely to arise from such a breach. The fact that the plans had a special value to the plaintiff, and could not be purchased, does not touch the question of including in the damages the injury to the plaintiff occasioned by reason of other contracts which he had made, and of work which he had undertaken in expectation of having the plans for use immediately, or after the usual delay involved in sending the plans to Boston, and in having them traced and returned to him. Damages for such injury are not given unless the circumstances are such as to show that the defendant ought fairly to be held to have assumed a liability therefor when it made the contract.

We think that *Hadley* v. *Baxendale*, 9 Exch. 341, which has been cited with approval by this court, governs this case.

The case of *Green* v. *Boston and Lowell Railroad*, 128 Mass. 221; s. c., 35 Am. Rep. 370, on which the plaintiff relies, was an action to recover the value of an "oil painting, the portrait of the plaintiff's father." The opinion attempts to lay down a rule for determining the value of such a painting, when the plaintiff had no other portrait of his father, and when, so far as appears, it had no market value; but the opinion does not discuss any question of damages not involved in determining the value of the portrait to the plaintiff. The plaintiff in that case made no claim for damages occasioned by a loss of a profitable use of the portrait.

Exceptions sustained.

Barnes v. Chicopee.

(138 Mass. 67.)

Municipal corporation — negligence — barrier on highway.

A town is not bound to erect a barrier on a highway to protect travellers from falling over a dangerous bank thirty-four feet distant from the travelled part, and nine and a half feet from the line of the highway as located.

Action for injuries by a defective highway. The head-note shows the case. The defendant had judgment below.

E. H. Lathrop, for plaintiffs.

G. M. Stearns, for defendant.

DEVENS, J. To entitle the plaintiffs to recover, they must show that the defect in the highway "which caused the injury, existed either in the highway or so immediately contiguous to it, as to make it dangerous to travel on the highway itself." *Sparhawk* v. *Salem*, 1 Allen, 30. The test is "whether there is such a risk of a traveller, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." *Alger* v. *Lowell*, 3 Allen, 402; *Adams* v. *Natick*, 13 Allen, 429. A town is therefore "bound to erect barriers or railings where a dangerous place is in such close proximity to the highway as to make travelling on the higway unsafe. But it is not bound to do so to prevent travellers from straying from the highway, although there is a dangerous place at some distance from the highway which they may reach by so straying." *Puffer* v. *Orange*, 122 Mass. 389; s. c., 23 Am. Rep. 368, and authorities there cited.

In determining whether a defect is in such close proximity to the highway as to render travelling upon it unsafe, that proximity must be considered with reference to the highway "as travelled and used for the public travel," rather than as located. *Warner* v. *Holyoke*, 112 Mass. 362. While it may be impossible to define at what distance in feet and inches a dangerous place must be from the highway in order to cease to be in close proximity to it, and while it must often be a practical question, having regard to many circumstances to be decided by a jury, yet it has been held in certain cases, as matter of law, that a jury was not authorized in finding that the dangerous place was in such proximity to the highway as to render travelling thereon unsafe.

Thus in *Murphy* v. *Gloucester*, 105 Mass. 470, the defective place was twenty-five feet from the highway; in *Puffer* v. *Orange*, *ubi supra*, it was from twenty to thirty feet; in *Daily* v. *Worcester*, 131 Mass. 452, it was twenty-eight feet. In all these cases the place where the accident happened was reached by passing over a level space, which intervened between it and the highway, yet these defective places were held not dangerously contiguous.

The case at bar is within the rule thus adopted. As appears by the report, "there was a marked travelled path made by use and the passage of teams;" there was also a plainly marked path worn by foot-passengers. From the worn track of teams to the edge of the bank was thirty-four feet. This bank was nine and a half feet

from the highway as located, and the foot-path was on the extreme southerly side of the highway. The causes of the injury to the plaintiff were the darkness, his failure to keep the carriage-path, his travelling on that made by foot passengers at the extreme edge of the highway as located, and the subsequent misconduct of the horse. It cannot be said that a bank thirty-four feet from the travelled way as used rendered it unsafe to travel thereon. This distance was sufficient to provide for those contingencies which from time to time might render necessary a road somewhat wider than that actually travelled.

Judgments on the verdicts.

MANNVILLE COMPANY v. CITY OF WORCESTER.

(138 Mass. 89.)

Water and water-course — diverting stream from mill in another State.

An action may be maintained in Massachusetts for diverting a stream in that State, and preventing it from coming to the plaintiff's mill in Rhode Island.

ACTION for diversion of a water-course. The opinion states the case. The plaintiff had judgment below.

W. S. B. Hopkins (*F. A. Gaskell* with him), for plaintiff.

F. P. Goulding, for defendant.

HOLMES J. This was an action of tort. It appeared at the trial that the plaintiff was the owner of a mill in Rhode Island upon the Blackstone river; and there was evidence that the defendant had withdrawn, in Massachusetts, enough of the waters of Tatnuck brook, a tributary of that river, materially to affect the operation of the mill. The main question argued before us is raised by the refusal of a ruling requested by the defendant that "the diversion of the waters of a natural stream in this State and preventing the same from coming to the plaintiff's mill, situated in Rhode Island, is not a tort for which the plaintiff can recover in the courts of this Commonwealth."

The defendant's counsel contended, in the first place, that such rights as the plaintiff claims cannot extend beyond the Rhode Island line, and went the length of maintaining that a servitude cannot be created in one State in favor of lands in another. We are unable to agree to this proposition upon either principle or authority. Every decision and dictum that we have found bearing on the precise point is the other way. *Slack* v. *Walcott*, 3 Mason, 508, 516; *Thayer* v. *Brooks*, 17 Ohio, 489; *Stillman* v. *White Rock Manuf. Co.*, 3 Woodb. & M. 538; *Rundle* v. *Delaware and Raritan Canal*, 1 Wall. Jr. 275; s. c., 14 How. 80; *Foot* v. *Edwards*, 3 Blatchf. 310.

We think that the cases which recognize civil and even criminal liability for flowing land in one State by means of a dam in another are hardly less pertinent. *Howard* v. *Ingersoll*, 17 Ala. 780; *Wooster* v. *Great Falls Manuf. Co.*, 39 Me. 246; *Eachus* v. *Illinois and Michigan Canal*, 17 Ill. 534; *Armendiaz* v. *Stillman*, 54 Tex. 623; *State* v. *Lord*, 16 N. H. 357. The defendant admits these cases to be law, and tries to distinguish them. But we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative; but in each it is the consequence of an act done outside the jurisdiction where the harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership, in the latter easement; but the laws of Rhode Island, which make a man owner of a tract of land there, have no more power to diminish freedom of action in Massachusetts than any other of its laws. A concurrence of the laws of both States is as necessary in that case as in the one at bar, to create a liability which can be enforced in either State consistently with principle. Such a concurrence presents no technical difficulties, and if the substantive end to be attained is a proper one it will be recognized and acted on here, as we have no doubt that it would be in Rhode Island if the position of the parties were reversed.

Of course the laws of Rhode Island cannot subject Massachusetts land to a servitude, and apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes. So it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do

either. It has no more objection to a citizen of Rhode Island owning an easement, as incident to his ownership of land in that State, than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here. *Slack* v. *Walcott, ubi supra.* So far as their creation is concerned, the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it sees fit to land there, Massachusetts being secured against any thing contrary to its views of policy by the common traditions of the two States, and by the power over its own territory which it holds in reserve.

It was also contended for the defendant that the action could only be brought in Rhode Island. This objection is purely technical. The reasons which once made the venue important have long disappeared, and we see no reason for any greater strictness than is absolutely required by the statutes and precedents. If the plaintiff's mill were in another county of this State an action for damages would be rightly brought in Worcester, not only by the Public Statutes (chap. 161, § 8), but by the common law. *Barden* v. *Crocker*, 10 Pick. 383; *Abbot of Stratford's* case, Y. B., 7 Hen. IV, 8, pl. 10; *Bulwer's* case, 7 Rep. 1 a, 2 b; *Leveridge* v. *Hoskins*, 11 Mod. 257. As between two States, both of which recognize the right, if the rule is to vary at all it should be on the side of greater liberality, to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained. The weight of judicial opinion is altogether in favor of allowing an action to be maintained where the water was withdrawn. *Foot* v. *Edwards, Armendiaz* v. *Stillman, Stillman* v. *White Rock Manuf. Co., Rundle* v. *Delaware and Raritan Canal* and *Thayer* v. *Brooks, ubi supra.* The decisions in cases where both the act and the consequence complained of were outside the State in which the action was brought are not opposed to our conclusion, and we are not called upon to decide between Lord MANSFIELD in *Mostyn* v. *Fabrigas*, Cowp. 161, 1 Smith Lead. Cas. (8th ed.) 652, and Lord KENYON in *Dawlson* v. *Matthews*, 4 T. R. 503. The American cases have generally followed the latter.

The plaintiff asked the court to rule "that the defendant was liable for damages measured by the loss of power which the whole amount of water pumped by the defendant would have made," although the defendant had introduced evidence that a certain percentage of it was returned to the river. This ruling was refused, and rightly. So far as the water was returned, its withdrawal was no wrong to the plaintiff. *Norton* v. *Volentine*, 14 Vt. 239; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 856. See *Elliot* v. *Fitchburg Railroad*, 10 Cush. 191. And even if it had been, the return would go in mitigation of damages, upon the same principle as in trover.

Judgment on verdict.

COMMONWEALTH v. PIERCE.

(138 Mass. 165.)

Criminal law — homicide — by negligence of physician.

A physician, causing the death of a patient by wrapping him in cloths saturated in kerosene, may be found guilty of manslaughter.*

CONVICTION of manslaughter. The opinion states the case.

F. P. Goulding, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

HOLMES, J. The defendant has been found guilty of manslaughter, on evidence that he publicly practiced as a physician, and being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar application with favorable results in other cases, but that in one, the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have "so much knowledge or probable information of

* See *State* v. *Hardister* (38 Ark. 605), 42 Am. Rep. 5.

the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, willful rashness, and not of an honest intent and expectation to cure." The seventh request assumes the law to be as thus stated. The sixth request was as follows: "If the defendant made the prescription with an honest purpose and intent to cure the deceased he is not guilty of this offense, however gross his ignorance of the quality and tendency of the remedy prescribed, or of the nature of the disease, or of both." The eleventh request was substantially similar, except that it was confined to this indictment.

The court instructed the jury that "it is not necessary to show an evil intent;" that "if by gross and reckless negligence he caused the death, he is guilty of culpable homicide;" that "the question is whether the kerosene (if it was the cause of the death), either in its original application, renewal or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant;" and that the defendant was "to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it." In other words, that the defendant's duty was not enhanced by any express or implied contract, but that he was bound at his peril to do no grossly reckless act when in the absence of any emergency or other exceptional circumstances he intermeddled with the person of another.

The defendant relies on the case of *Commonwealth* v. *Thompson*, 6 Mass. 134, from which his fifth request is quoted in terms. His argument is based on another quotation from the same opinion: "To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription." This language is ambiguous, and we must begin by disposing of a doubt to which it might give rise. If it means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully, and latterly, we may add, much more willingly recognized that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful for independent

reasons, from which death accidentally ensues. 3 Inst. 57; 1 Hale P. C. 472–477; 1 Hawk. P. C., chap. 29, §§ 3, 4, 12; chap. 31, §§ 4–6; Foster, 262, 263 (Homicide, chap. 1, § 4); 4 Bl. Com. 192, 197; 1 East P. C. 260 *et seq.*; *Hull's* case, Kelyng, 40, and cases cited below.

But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one or everybody else might be led to anticipate or apprehend them if the supposed act were done. We have to determine whether recklessness in this sense was necessary to make the defendant guilty of felonious homicide, or whether his acts are to be judged by the external standard or what would be morally reckless, under the circumstances known to him, in a man of reasonable prudence.

More specifically, the questions raised by the foregoing requests and rulings are whether an actual good intent and the expectation of good results are an absolute justification of acts, however foolhardy they may be if judged by the external standard supposed, and whether the defendant's ignorance of the tendencies of kerosene administered as it was will excuse the administration of it.

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly-defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of TINDAL, C. J.: "Instead therefore of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, 475; s. c., 4 Scott, 244.

If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall, in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits of conduct for the community, in the interest of the safety of all.

There is no denying however that *Commonwealth* v. *Thompson*, although possibly distinguishable from the present case upon the evidence, tends very strongly to limit criminal liability more narrowly than the instructions given. But it is to be observed that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord Hale (1 P. C. 429), to the effect "that if a physician, whether licensed or not, gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, he is not guilty of murder or manslaughter." 6 Mass. 141. If this portion of the charge to the jury is reported accurately, which seems uncertain (6 Mass. 134, n.), we think that the court fell into the mistake of taking Lord Hale too literally. Lord Hale himself admitted that other persons might make themselves liable by reckless conduct. 1 P. C. 472. We doubt if he meant to deny that a physician might do so as well as any one else. He has not been so understood in later times. *Rex* v. *Long*, 4 C. & P. 423, 436; *Webb's* case, 2 Lewin, 196, 211. His text is simply an abridgment of 4 Inst. 251. Lord Coke there cites the Mirror (chap. 4, § 16) with seeming approval in favor of the liability. The case cited by Hale does not deny it. Fitz. Abr. *Corone*, pl. 163. Another case of the same reign seems to recognize it. Y. B. 43 Edw. III, 33, pl. 38, where Thorp said that he had seen one M. indicted for killing a man whom he had undertaken to cure, by want of care. And a multitude of modern cases have settled the law accordingly in England. *Rex* v. *Williamson*, 3 C. & P. 635; *Tessymond's* case, 1 Lewin, 169; *Ferguson's* case, 1 Lewin, 181; *Rex* v. *Simpson*, Willcock, Med. Prof., pt. 2, ccxxvii; *Rex* v. *Long*, 4 C. & P. 398; *Rex* v. *Long*, 4 C. & P. 423; *Rex* v. *Spiller*, 5 C. & P. 333; *Rex* v. *Senior*, 1 Moody, 346; *Webb's* case, *ubi supra*; S. C., 1 Mood. & Rob. 405; *Queen* v. *Spilling*, 2 Mood. & Rob. 107; *Regina* v. *Whitehead*, 3 C. & K. 202; *Regina* v. *Crick*, 1 F. & F. 519; *Regina* v. *Crook*, 1 F. & F. 521; *Regina*

v. *Markuss*, 4 F. & F. 356; *Regina* v. *Chamberlain*, 10 Cox C. C. 486; *Regina* v. *Macleod*, 12 Cox C. C. 534. See also *Ann* v. *State*, 11 Humph. 159; *State* v. *Hardister*, 38 Ark. 605; s. c., 42 Am. Rep. 5, and the Massachusetts cases cited below.

If a physician is not less liable for reckless conduct than other people, it is clear, in the light of admitted principle and the later Massachusetts cases, that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor. The only difference is that the latter inquiry is still more obviously external to the estimate formed by the actor personally than the former. But it is familiar law that an act causing death may be murder, manslaughter or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder. *Commonwealth* v. *Drew*, 4 Mass. 391, 396; *Commonwealth* v. *Fox*, 7 Gray, 585. The doctrine is clearly stated in 1 East P. C. 262.

The very meaning of the fiction of implied malice in such cases at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was that his failure or inability to predict them was immaterial, if under the circumstances known to him, the court or jury, as the case might be, thought them obvious.

As implied malice signifies the highest degree of danger, and makes the act murder, so if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter, as in the case of an ordinary assault with feet and hands, or a weapon not deadly, upon a well person. Cases of *Drew* and *Fox*, *ubi supra*. Or firing a pistol into the highway, when it does not amount to murder. *Rex* v. *Burton*, 1 Str. 481. Or slinging a cask over the highway in a customary but insufficient mode. *Rigmaidon's* case, 1 Lewin, 180. See *Hull's* case, *ubi*

supra. Or careless driving. *Rex* v. *Timmins*, 7 C. & P. 499; *Regina* v. *Dalloway*, 2 Cox C. C. 273; *Regina* v. *Swindall*, 2 C. & K. 230.

If the principle which has thus been established both for murder and manslaughter is adhered to, the defendant's intention to produce the opposite result from that which came to pass leaves him in the same position with regard to the present charge that he would have been in if he had had no intention at all in the matter. We think that the principle must be adhered to, where as here the assumption to act as a physician was uncalled for by any sudden emergency and no exceptional circumstances are shown; and that we cannot recognize a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.

We have implied however in what we have said, and it is undoubtedly true as a general proposition, that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown. And it may be asked why the dangerous character of kerosene, or "the fatal tendency of the prescription," as it was put in the fifth request, is not one of the circumstances the defendant's knowledge or ignorance of which might have a most important bearing on his guilt or innocence.

But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it and who had no warning would not be held liable for the harm. If men were held answerable for every thing they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. And therefore again, if the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, which seems to have been the view of the common law with regard to bulls; for instance, a person to be made liable must have notice of some past experience, or as is commonly said, "of

the quality of his beast." 1 Hale P. C. 430. But if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril. When the jury are asked whether a stick of a certain size was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was. *Commonwealth* v. *Drew, ubi supra.* See also *Commonwealth* v. *Webster,* 5 Cush. 295, 306. So as to an assault and battery by the use of excessive force. *Commonwealth* v. *Randall,* 4 Gray, 36. So here. The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough. *Commonwealth* v. *Stratton,* 114 Mass. 303, 305. Indeed, if the defendant had known the fatal tendency of the prescription he would have been perilously near the line of murder. *Regina* v. *Packard,* C. & M. 236. It will not be necessary to invoke the authority of those exceptional decisions in which it has been held, with regard to knowledge of the circumstances, as distinguished from foresight of the consequences of an act, that when certain of the circumstances were known, the party was bound at his peril to inquire as to the others, although not of a nature to be necessarily inferred from what were known. *Commonwealth* v. *Hallett,* 103 Mass. 452; *Regina* v. *Prince,* L. R., 2 C. C. 154; *Commonwealth* v. *Farren,* 9 Allen, 489.

The remaining questions may be disposed of more shortly. When the defendant applied kerosene to the person of the deceased in a way which the jury have found to have been reckless, or in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify by her consent, and which therefore was an assault notwithstanding that consent. *Commonwealth* v. *Collberg,* 119 Mass. 350. See *Commonwealth* v. *Mink,* 123 Mass. 422, 425. It is unnecessary to rely on the principle of *Commonwealth* v. *Stratton* (*ubi supra*), that fraud may destroy the effect of consent, although evidently the consent in this case was based on the express or implied representations of the defendant concerning his experience.

As we have intimated above, an allegation that the defendant knew of the deadly tendency of the kerosene was not only unnecessary, but improper. *Regina* v. *Packard, ubi supra.* An allegation that the kerosene was of a dangerous tendency is superfluous, although similar allegations are often inserted in indictments, it being enough to allege the assault, and that death did in fact result from it. It would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with exposure. See *Commonwealth* v. *Macloon*, 101 Mass. 1. See further the second count, for causing death by exposure, in *Stockdale's* case, 2 Lewin, 220; *Regina* v. *Smith*, 11 Cox C. C. 210. The instructions to the jury on the standard of skill by which the defendant was to be tried, stated above, were as favorable to him as he could ask.

The objection to evidence of the defendant's previous unfavorable experience of the use of kerosene is not pressed. The admission of it in rebuttal was a matter of discretion. *Commonwealth* v. *Blair*, 126 Mass. 40.

Exceptions overruled.

Adams v. Marshall.

(138 Mass. 238.)

Deed — implied easement of support.

The plaintiff deeded land on which was a barn, by metes and bounds, to the defendant. The boundary line ran through the barn. The defendant cut off the part of the barn on his own land. *Held*, that he was liable for depriving the plaintiff of its support and shelter.

TRESPASS. The head-note states the case. The plaintiff had judgment below.

W. G. Bassett, for defendant.

D. W. Bond, for plaintiff.

Field, J. [Minor matter omitted.] It is not denied by the plaintiff, that so far as the barn was situated on the land conveyed, it passed to the defendant by virtue of the deed. One claim of the plaintiff is that the defendant in cutting off the easterly end of

the barn cut over the line and upon the land of the plaintiff, and this the presiding justice has found to be true, and has assessed damages therefor.

The defendant asked the court to rule that the whole barn passed to the defendant as parcel of, or appurtenant to, the homestead of Joseph Adams. This was rightly refused. There is no mention of the barn in the deed to the defendant; the premises are conveyed by metes and bounds. Whatever title the defendant has in the barn has been acquired because the barn was so attached to the realty as to have become a part of it, and therefore that part of the barn which was within the boundaries of the land conveyed to him passed to him by the deed as a part of the premises conveyed. The use of the whole barn was not necessary to the enjoyment of the premises granted, and there are no words in the deed whereby the grant can be extended beyond the boundaries of the land.

The plaintiff contended that he had a right to have the whole barn remain as it was at the time of the conveyance to the defendant, and that the defendant had no right to cut off the portion of it which was on his land, and thus deprive the portion on the plaintiff's land of the support and shelter which the easterly end of the barn afforded. The defendant asked the court to rule "that the plaintiff had no right or servitude of support for the part of the barn which was on the plaintiff's land." This ruling was refused, and damages were assessed "for the loss of support to the plaintiff, and for loss of shelter to the plaintiff's part of the barn."

The plaintiff relies upon *Pierce* v. *Dyer*, 109 Mass. 374; s. c., 12 Am. Rep. 716. The only point decided in that case was that when the owner of a dwelling-house conveys to two persons distinct parts of it, separated vertically by an imaginary plane, there is no implied obligation on one grantee to keep his part in repair for the benefit of the other part. The opinion however assumes as settled "that where two or more houses, so constructed as to require mutual support, are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, a right of support, as incident to the property, passes by the conveyance to each grantee, unless excluded by the terms of the grant;" and *Richards* v. *Rose*, 9 Exch. 218, is cited. The court also say: "It is to be considered that the necessity which lies at the foundation of the right arises from the existing relations of

artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it." In *Richards* v. *Rose*, the declaration alleged that the plaintiff owned a messuage and dwelling-house, and was entitled to have the same supported by the adjoining land and premises of the defendant; that the defendant dug a drain and removed a part of his land, and thereby deprived the messuage and dwelling-house of the plaintiff of the support to which she was entitled, whereby the walls of her house cracked and gave way. No question of the right of shelter as distinguished from the right of the plaintiff to have her house supported by the defendant's premises arose; and the declaration apparently proceeds upon the ground that the plaintiff's right of support to her land and building had been invaded by the removal of the support afforded by the defendant's land. The case finds that the plaintiff's and defendant's houses adjoined each other on the same street, and had been originally the property of the same person, who had demised them to one person by separate instruments, and the lessee had mortgaged his interest in both, and the mortgagee under a power had sold the leasehold interest in one to the plaintiff in July, 1849, and in the other to the defendant in September following. The action therefore was between the holders of leasehold estates derived from the same owner "to recover compensation for damage done to the plaintiff's house by the disturbance of its foundations." The defendant contended that there was no evidence that the plaintiff's title was prior to that of the defendant; but the court held that the question of priority did not affect the matter; assumed that the houses were all built together, and each obviously required the support of its neighbors for their common protection and security; and further held that in such a case there is either by a presumed grant or a presumed reservation a right to such mutual support.

The law in this Commonwealth relating to reservations which are implied by law in favor of the grantor in a deed was carefully considered in *Carbrey* v. *Willis*, 7 Allen, 364. The distinction is taken between a conveyance of a messuage, house, farm, manor or mill, and a conveyance by metes and bounds; by the former, many things pass which have been used with the principal thing as par-

cel of or appurtenant to the granted premises, which will not pass by the latter. Whatever is included or excluded from the grant by reason of the construction given to the deed is included or excluded by the terms of the deed. By grants or reservations by implication of law are meant such as the law implies from the circumstances, and which are not found by construction in the contract. The court refused to follow *Pyer* v. *Carter*, 1 H. & N. 916, and held the rule in respect to easements which pass by implication with some strictness even against the grantor, or between grantees taking deeds at the same time from the same grantor, and say that "where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty and against incumbrances, we think there is no just reason for holding that there can be any reservation by implication unless the easement is strictly one of necessity." The strictness with which this rule is held, as between grantees from one grantor by deeds simultaneously delivered, is shown by *Buss* v. *Dyer*, 125 Mass. 287; and as is there stated the English cases which deny the authority of *Pyer* v. *Carter* agree with ours that a grantor cannot be permitted to derogate from his absolute grant unless in case of strict necessity. See also *Wheeldon* v. *Burrows*, 12 Ch. Div. 31; *Russell* v. *Watts*, 25 Ch. Div. 559.

The familiar instance of a reservation by implication of law is a way by necessity. The law upon ways by necessity has been frequently considered by this court, and it is established that such ways exist only so long as the necessity exists; that the necessity required is not an absolute necessity; that the reservation of such a way to the grantor is to be implied when necessary, as well as a grant of such a way to the grantee; and that this implied reservation of a way to the grantor over the land granted is not a breach of the covenants of warranty or against incumbrances contained in the deed. If the land owner can at reasonable cost construct a way over his own land, there is no way by necessity. *Schmidt* v. *Quinn*, 136 Mass. 575; *Brigham* v. *Smith*, 4 Gray, 297.

Richards v. *Rose*, *ubi supra*, was assumed to be settled law in *Pierce* v. *Dyer*, *ubi supra*, and the case is perhaps approved in England by those judges who question or deny the authority of *Pyer* v. *Carter*, on the assumption that the two houses were so constructed as to be mutually subservient and dependent on each

other, neither being capable of standing or being enjoyed without the support it derived from its neighbor. *Wheeldon* v. *Burrows*, 12 Ch. Div. 59; *Suffield* v. *Brown*, 4 DeG., J. & S. 185, 187; *Russell* v. *Watts, ubi supra.*

Mitchell v. *Seipel*, 53 Md. 251; s. c., 36 Am. Rep. 104, is a well-considered case, in which the distinction between grants and reservations by implication is carefully traced, and the doctrine maintained that the grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, yet it cites with approval *Richards* v. *Rose, ubi supra*, and says: "This furnishes another instance of an easement of necessity within the exception to the general rule forbidding implied reservations." These implied rights of support of the grantor and grantee in the premises of each other have been called mutual or reciprocal easements, because there is a necessity for mutual support; *Russell* v. *Watts, ubi supra*; and the burden imposed on each is accompanied by a corresponding benefit to the other.

It is probable that the demise in *Richards* v. *Rose* was, in terms, of a house, and that the house was divided by a partition from the adjoining house, although they were so constructed that each required the support of the other. We are not however required to determine in the case at bar, whether if the deed had conveyed in terms a part of the barn, each then would not have had the right to insist that the whole remain as it was at the time of the conveyance, or whether the rights of the grantee are or are not in this respect greater than those of the grantor. The plaintiff as one of the grantors conveyed to the defendant, by warranty deed, the premises by metes and bounds. There is no reference to the barn, but the boundary line in fact ran through the barn. The plaintiff has reserved no rights in the part conveyed; there is nothing in the deed that by construction gives him any rights in it, and by implication of law he can have none that are not strictly necessary to the enjoyment of his estate. After the repeated references to *Richards* v. *Rose*, either with approval or without disapproval, we do not feel at liberty to hold that the necessity for support from the defendant's premises does not exist, because the plaintiff can erect a sufficient support upon his own land, although a way by necessity would not be implied under similar circumstances. It is the injury to the plaintiff's estate

by the acts of the defendant, after the grant, in changing the existing relations between the two estates that the plaintiff complains of.

The plaintiff has no right to the light or air that comes to him from the defendant's part. The defendant, we have no doubt, could have lawfully erected a partition through the barn upon his line. It cannot be that the plaintiff has the right to compel the defendant to permit his end of the barn, however long it may be, to remain on his land for the plaintiff's benefit. The only right of the plaintiff, we think, is the right of support to his end. Although this right is a conventional and not a natural one, because it is an artificial structure, we think it is analogous in many respects to the right to the lateral support of land by land. This right does not prevent one landowner from removing the soil and withdrawing the natural support, provided he furnishes the adjoining landowner with an equivalent support, as by a wall or other structure, and does no actual damage to the adjoining land. The defendant had, we think, the right to cut off his end of the barn, provided he left the plaintiff's part as well supported as before; but so far as he has by his acts impaired the plaintiff's right to support, he is liable in damages. The difficulty is in determining whether the plaintiff's right of support included also the right to the shelter afforded by the covering of the defendant's part. In *Pierce* v. *Dyer*, *ubi supra*, it is assumed that the right of support included that of shelter, but no decisions to that effect have been shown us. Some analogy may perhaps be derived from the reciprocal rights and obligations of the owner of an upper to the owner of a lower tenement in the same building. It has been said that the owner of the lower tenement has no right to destroy the supports of the upper tenement, and that the owner of the upper tenement has no right to destroy the coverings which protect the lower tenement, although at common law neither is bound to the other to repair his tenement. The actual decisions on this subject are meagre, except in the case of mines, where the right of the owner of the soil to subjacent support is well settled. See *Loring* v. *Bacon*, 4 Mass. 574; *Calvert* v. *Aldrich*, 99 Mass. 74; *Graves* v. *Berdan*, 26 N. Y. 498; *Stevens* v. *Thompson*, 17 N. H. 103; *Chesseborough* v. *Green*, 10 Conn. 318; *McCormick* v. *Bishop*, 28 Iowa, 233; *Ottumwa Lodge* v. *Lewis*, 34 Iowa, 67; s. c., 11 Am. Rep. 135; *Caledonian Railway* v. *Sprot*, 2 Macqueen, 449; *Harris* v. *Ryding*, 5

M. & W. 60; *Humphries* v. *Brogden*, 12 Q. B. 739; *Dalton* v. *Angus*, 6 App. Cas. 740.

The necessity which was apparent in the case at bar was that each part should have the support and shelter of the other, for its beneficial use. Although the plaintiff could construct a support and shelter for his part upon his own land, yet all adjoining landowners can do this, and they are not compelled in this way to protect their land as a substitute for the natural support and protection of adjoining land. See *Mears* v. *Dole*, 135 Mass. 508. We think similar considerations apply when similar rights are acquired in artificial structures, and that if the defendant removed his end of the barn he was bound to supply an equivalent support and shelter, or pay the plaintiff the cost of constructing such a support and shelter, if it were practicable to construct them, and the cost did not exceed the damage to the plaintiff's estate, and that the rulings of the court were substantially correct.

The measure of damages is not necessarily what it would cost the plaintiff to construct such a support and shelter, but compensation for the injury to his estate caused by reason of having been deprived by the defendant of the existing support and shelter. *Gilmore* v. *Driscoll*, 122 Mass. 199; s. c., 23 Am. Rep. 312.

No exception has been taken to the rule of damages, if the loss of shelter was to be considered as an element of damage. As the right is reserved to the plaintiff by implication of law out of his grant, he is not estopped from claiming it by the covenants in his deed.

Exceptions overruled.

Mooney v. Howard Insurance Company.

(138 Mass. 375.)

Evidence — usage — to explain insurance.

In an action on a policy of fire insurance on a junk-dealer's stock of "rags" and "old metals," evidence is competent to show that by usage in that trade "rags" includes all articles used in the manufacture of paper, and "old metals" includes such articles as old rubber and old glass.

ACTION on a fire insurance policy. The head-note states the point. The plaintiff had judgment below.

C. P. Thompson and *G. B. Ives*, for defendant.

J. M. Raymond and *S. C. Bancroft*, for plaintiff.

MORTON, C. J. The defendant insured the plaintiff "on his stock of rags, old metals, bones and barrels" contained in his storehouse. The plaintiff is a junk-dealer, "his stock" consisting of old articles and materials, paper stock, pieces and fragments of all kinds, and it could not be particularly described in a policy or other contract without great prolixity. We think it was competent for the plaintiff to prove that by a usage of the trade the terms "rags" and "old metals" had acquired a broader signification than belongs to these words as commonly used. It was an application to the rule that where words have two meanings, one common and the other peculiar and technical, it is competent to show that they were used in the latter sense. 1 Greenl. Ev., § 295; *Macy* v. *Whaling Ins. Co.*, 9 Metc. 354; *Daniels* v. *Hudson River Ins. Co.*, 12 Cush. 416, and cases cited.

The usage upon which the plaintiff relied was not a particular or a local usage, but was a general usage of the trade. The defendant asked the court to rule "that a usage or custom of a particular trade, in order to bind the defendant, must be proved by substantive evidence to have been known to it or its agent, and that it was not enough that the jury should presume such knowledge if they found such a usage to have been of long continuance." The court refused this ruling, and instructed the jury "that the plaintiff must prove that the alleged usage was known to the defendant, and that they would be warranted in finding that it was known to the defendant, if they found, upon all the evidence, that there was such a usage or custom, and that it was well defined, universal, uniform and of long continuance." We understand this to mean that the jury might infer the knowledge of the defendant from the universality and long existence of the usage. A usage such as the instructions required having been proved, the defendant's contract is deemed to have been entered into with reference to such usage if known to it.

Underwriters insuring by certain words may fairly be presumed to know the mercantile meaning of those words; and the fact of a wide-spread and established use has at least a tendency to show that they had such knowledge. *Howard* v. *Great Western Ins.*

Co., 109 Mass. 384; *Croucher* v. *Wilder*, 98 Mass. 322; *Astor* v. *Union Ins. Co.*, 7 Cow. 202.

We are of opinion that the instructions given at the trial were sufficiently favorable to the defendant.

Exceptions overruled.

O'Brien v. Boston and Albany Railroad Company.

(138 Mass. 387.)

Master and servant — fellow-servants — railroad employees.

A gang of track-repairers on a railroad quit work fifteen minutes before the usual hour, by order of the foreman, to take a train for a certain station, whither they were to be carried free, according to a monthly custom, to be paid off. The plaintiff in endeavoring to board the train was injured by a hand-car worked by other men in the company's employment. *Held*, that he could not recover therefor. (*See note, p.* 280.)

ACTION for personal injuries by negligence. The head-note states the case. The defendant had judgment below.

H. H. Winslow, for plaintiff.

A. L. Soule, for defendant.

W. Allen, J. The ruling that the plaintiff was, at the time he was injured, in the service of the defendant, was correct. He was not only taking the cars of the defendant to be carried by it from the place where he had been working to Boston that he might be paid his wages, but he was acting under express orders of the defendant during working hours. The relation between the parties was not changed when he received and obeyed the order to quit work upon the track and take the train for Boston, and the plaintiff continued under present obligation to the defendant to do what it should require of him within the scope of his employment. He was, at the time, a fellow-servant with those whose negligence was alleged to be the cause of his injury. *Gillshannon* v. *Stony Brook R.*, 10 Cush. 228; *Seaver* v. *Boston and Maine R.*, 14 Gray, 466; *Gilman* v. *Eastern R.*, 10 Allen, 233; *Tunney* v. *Midland R'y*, L. R., 1 C. P. 291; *Russell* v. *Hudson River R.*, 17 N. Y. 134;

Ross v. *N. Y. Cent., etc., R.*, 5 Hun, 488; affirmed, 74 N. Y. 617; *Manville* v. *Cleveland and Toledo R.*, 11 Ohio St. 417.

Judgment on verdict.

NOTE BY THE REPORTER.— See *Vick* v. *N. Y. Cent., etc., R. Co.*, 95 N. Y. 267; s. c., 49 Am. Rep. 36.

In *State* v. *Western Md. R. Co.*, 63 Md. 433, A. was employed by defendant as brakeman on a train running daily, Sundays excepted, from U. to B. and back. From Saturday evening until Monday morning this train remained at U. A. was employed and paid by the day, but was not paid for Sunday unless required for duty on that day. On Saturday evenings, with the permission of the conductor of his train, and after his work for the day was ended, he was in the habit of leaving U. on another train bound for B., with the intention of spending Sunday in B. with his family and returning to U. in time to go out with his own train on Monday morning. On such occasions he was permitted to travel free of charge on a pass which the conductor of his train held for himself and crew. On a Sunday while thus riding to Baltimore on the conductor's pass in the caboose car of a freight train of the company, A. was killed by a collision with another train, caused by the negligence of the employees of the company. *Held*, that A. at the time of the collision was not acting in the service of the company, but was substantially a stranger, and entitled to all the privileges he would have had if he had not been an employee. The court said:

"A case very similar to the one before us has already been decided by this court. In the case of *Balt. and Ohio R.* v. *State*, 33 Md. 542, Trainor was employed and paid by the day. At six o'clock P. M. his day's work ended, and on a day that he had been at work, but had finished his day and laid aside his tools, and was on his way home, and not on that portion of the track upon which he worked, the injury occurred. He had expected to resume his work the next morning. With these facts before it, this court decided that at the time of the injury he could not be considered in the employment of the company.

"The decision in *Trainor's* case proceeds upon the assumption that he was not at the time of the injury acting in the service of the company; that his day's labor was over for the day, and although he expected to resume work again on the next day, that when his day's work was over he occupied toward the company the position of a stranger, and was entitled to all the privileges he would have had if he had not been an employee.

"The facts in this case are stronger than those in *Trainor's* case. The deceased had finished his week's work on Saturday evening, expecting to resume it on Monday. He had been expressly relieved from all service to the company until Monday, and was given permission to go to Baltimore. He could call the Sunday on which he was killed entirely his own day, and employ himself in it as he pleased, and he therefore could not be considered on that day as acting in the service of the company.

"The principle of *Trainor's* case is, we think, fully sanctioned by the English cases. In *Hutchinson* v. *York, Newcastle and Berwick R'y Co.*, 6 Eng. R'y

and Canal Cases, 438, the court exempted the railway company from liability for the death of Hutchinson, because, it said, 'the death of Hutchinson appears on the pleadings' (the question having arisen on demurrer) 'to have happened while he was acting in the discharge of his duties to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service.' And the court held the railway company not liable; but lest the principle there stated might be carried too far the court proceeded to say:

"'It may however be proper with reference to this point to add that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master. In such a case the servant is substantially a stranger and entitled to all the privileges he would have had if he had not been a servant.'

"The case of *Tunney* v. *Midland R'y Co.*, L. R., 1 C. P. 291, cited by the appellee, is not in conflict with *Hutchinson's* case. In that case Tunney was a day laborer, who was to be carried by express contract on the defendant's train daily from Birmingham, where he resided, to the spot where his work was to be done, and carried back when his day's work was over, to Birmingham. He was injured while returning home on the defendant's train; and the court, EARL, C. J., said: 'The only question is whether the plaintiff was at the time in the employ of the company. Clearly he was. It was part of the contract of service that he was to return each day to Birmingham by the pick-up train, to be ready to start on his work the next morning. There is therefore nothing to take the case out of the ordinary rule.' WILLES, J., said: 'The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference, for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be.'

"The case of *Marshall* v. *Stewart*, 33 E. L. & E. 1, also cited by the appellee, turns entirely upon the duty and responsibility of the master to the servant, and not upon the negligence of a fellow-servant as this case does. The case of *Seaver* v. *Boston and Maine R.*, 14 Gray, 466, and the case of *Gilshannon* v. *Stonybrook R. Corp.*, 10 Cush. 228, cited by appellee, were decided upon the theory that the defendants had agreed to convey the plaintiff to and from his work, and that the accident happened while being so conveyed; that such conveyance was in fact a part of the contract.

"But other American cases do not agree with the cases in Gray and Cushing. In the case of *O'Donnell* v. *Allegheny Valley R. Co.*, 59 Penn. St. 239, the plaintiff, a carpenter, was employed by the railroad to work on a bridge some fifteen miles from his home. In consideration of a reduction in his wages the company agreed to carry him to and from his work. On his returning home on a certain day the accident happened. AGNEW, J., in delivering the opinion of the court, said: 'The plaintiff, O'Donnell, was travelling, not as a part of his employment as a carpenter at the bridge, but as a passenger from and to his home. When his day's work was performed, he was no longer in the service of the company, but was free to go or to stay.'

"So also in the case of *Russell* v. *H. R. R. Co.*, 5 Duer, 39. In that case the

road employed the plaintiff by the day, and agreed to carry him to and from his work. On his return the accident happened. The Superior Court of New York held the company liable, although it was a part of the contract that the company should carry the plaintiff back to his home. They held that the plaintiff had performed all his part of the contract.

"In whatever else they may differ, these cases all agree upon one principle, and that is, that if the plaintiff is not at the time of the accident engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of his employees. That because he works daily for the company, and is styled its employee, the company is not exempt from liability for the negligence of its other servants at all times and under all circumstances. That the exemption depends upon actual service within the scope of his employment.

"In the case before us the servant was not at the time of the injury acting in the service of the master. Nor was he engaged in fulfilling any part of the contract with his employer. It was no part of his contract with the railway company that he should go to Baltimore to visit his family, but such visits were entirely outside and foreign to the service he owed it, and which he had contracted to perform. By the express permission of his superior officer he was released from the obligation of service for the day on which he was killed. He was therefore on that day substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant, unless the fact urged in the argument by the appellee, that he was riding in the cars upon an employee's pass, will alter the case.

"It is not necessary for us to consider the question of the power of a transportation company to exempt itself from liability for the negligence of its employees by special contract entered into with recipients of free passes. It does not appear from the record in this case, that there was any such contract entered into between Abell and the company. Abell had, it seems, only the common employee's pass, which enabled him to ride free, and that was all. He had made no agreement with the company exempting it from liability, but was only exercising the privilege that he had in common with the other employees of riding in the company's cars without paying fare.

"Mr. Cooley, in his work on Torts, goes so far as to say that carriers of passengers cannot relieve themselves from the obligation to observe ordinary care by any contract whatever, even in cases where free passage is given as a matter of favor or courtesy. Cooley Torts, 685.

"He says that in some of the States it has been held to be competent to contract against liability for any negligence except that of the carrier himself, but that the weight of authority, both in England and this country, is distinctly the other way. But the question of the exemption of the carrier from liability for accidents by special contract not arising in this case, it is unnecessary to examine authorities on that point, and we will confine ourselves to cases where the passenger was carried gratuitously, but without special contract.

"In the case of the *Philadelphia & Reading R. Co.* v. *Derby*, 14 How. U. S. 468, the plaintiff was a stockholder in the company, riding by invitation of the president and paying no fare, and not in the usual passenger cars when he was

injured. The court below instructed the jury, that notwithstanding these facts, if they found the injury was caused by the gross negligence of the servants of the road, the company was liable. Upon appeal the Supreme Court of the United States said, in affirming the judgment: 'This duty to carry safely does not result alone from the consideration paid for the service. It is imposed by law, even where the service is gratuitous.' The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' It is true, a distinction has been taken in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is only liable for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence.'

"'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary, or otherwise, the personal safety of the passenger should not be left to the sport of chance or the negligence of careless agents. Any negligence in such case may well deserve the epithet of 'gross.'

"The principle announced in this decision that the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law, has been recognized by this court on the motion to re-argue the case of *Baltimore City Pass. Ry. Co.* v. *Kemp*, 61 Md. 619; s. c., 48 Am. Rep. 134, where the court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful irrespective of contract, and this court illustrates the principle by the example of a child for whom no fare is charged, but who could recover in case of injury, the result of negligence.

"In the case of *Steamboat New World* v. *King*, 16 How. 469, the point again directly arose whether a passenger who was carried gratuitously could hold the company liable for gross negligence. The court quote the paragraph we have quoted from the opinion in 14 Howard, and say in relation to it:

"'We desire to be understood to re-affirm that doctrine, as resting, not only on public policy, but on sound principles of law.' The court further say, that it is doubtful whether degrees in negligence can be usefully applied in practice, or that their meaning is fixed or capable of being fixed, and strongly intimate that the theory of degrees in negligence is unfounded in justice, useless in practice, and presenting inextricable embarrassments. The court said however that the case before it was a case of gross negligence according to the tests which had been applied to such case. There are degrees of negligence in the sense that some acts evidence a greater degree of carelessness and recklessness than do other acts which may still be classed as negligent. But the difference between gross and ordinary negligence is more a question of fact than of law.

"Relying upon the cases in 14 and 16 Howard, above referred to, Judge WALLACE, in the case of *Waterbury* v. *N. Y. C. & H. R. Co.*, decided in 1883, in the U. S. Circuit Court for the Northern District of N. Y., 17 Fed. Rep. 671, said: 'The carrier does not by consenting to carry a person gratuitously release himself from responsibility for negligence. When the assent to his riding

free has been legally and properly given, the person carried is entitled to the same degree of care as if he had paid his fare.'

"The pass was no part of the contract between Abell and the railroad. The contract between them was to pay a certain sum for a day's work. It was given as a mere gratuity, and as other passes are given. No action for a breach of contract could have been maintained by Abell if the road had taken away the pass at any time. Sometimes a special contract is made with the recipient of the pass, and written or printed on it, that the person accepting the pass will in consideration thereof assume all the personal risk incident to the travel. We must not be understood to decide upon the legal effect of such a contract. That question does not arise in this case, and it will be time enough to decide it when it does arise. All that we mean now to decide is that when the carrier undertakes, without any such special contract, to carry a passenger gratuitously, he is entitled to the same degree of care as if he had paid his fare."

COLE v. CASSIDY.

(138 Mass. 437.)

Fraud — director's representation of solvency of bank.

In an action against a director of a bank for falsely representing the bank to be solvent, by means whereof the plaintiff was induced to buy stock and make deposits, it must appear that the defendant knew his representation to be false, or that the fact not being within his knowledge he falsely represented it as of his own knowledge.*

ACTION for deceit. The opinion states the case. The defendant had judgment below.

A. B. Wentworth, for plaintiff.

I. W. Richardson and *T. S. Dame,* for defendant.

MORTON, C. J. This is an action of tort for deceit. The declaration alleges that the defendant was a director of the Pacific National Bank; that he falsely and fraudulently represented of his own knowledge that the bank was sound; that the plaintiff was thereby induced to buy stock and make deposits in the bank; that the bank was not sound, and that the defendant when he made

* See *Cowley* v. *Smyth* (46 N. J. L. 380), 50 Am. Rep. 432.

the representations knew them to be untrue. The case proceeded upon two grounds; one, that the defendant, to induce the plaintiff to act, stated facts which he knew to be untrue; the other, that he stated facts as of his own knowledge which were not true. To meet the first ground, the evidence put in by the defendant against the objection of the plaintiff was competent. It stated the relations of the defendant to the bank, and tended directly to show that he did not know that the bank was unsound, and thus to meet the allegation of the declaration that he knew his statements to be untrue.

The only other exception taken by the plaintiff was to the refusal of the court to give the instruction requested by him. He requested the court to instruct the jury "that if they found the defendant's representation as to the soundness of the bank was made as a statement of existing fact and as of his own knowledge, and if such representation was in fact untrue, it was not necessary for the plaintiff to prove that the defendant made the representation with intent to deceive, but that it was sufficient for him to show that the defendant made the representation with the intent to induce the plaintiff to rely and act upon it, and that the plaintiff did so act and rely." The court was not required to give the instructions in the precise words of the request. It instructed the jury, in substance, that the plaintiff could recover if he proved that the defendant represented as an existing fact that the bank was sound; that the plaintiff was thereby induced to act; that in fact the bank was not sound, and that the defendant then knew that it was not sound, or that the fact of the soundness of the bank being a fact within his means of knowledge, he stated that the bank was sound, having no knowledge of that fact; and further, that if these facts were established the defendant would be liable, although he believed and had reasonable cause to believe his representations to be true.

These instructions are in accordance with the established rules that to maintain an action of deceit the plaintiff must prove representations of material facts which are false, and which induce him to act; and either that the defendant knew them to be false, or that the facts being facts susceptible of knowledge, he represented as of his own knowledge that they were true, when in fact he had no such knowledge. *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Milliken* v. *Thorndike*, 103 Mass. 382.

The request of the plaintiff was in substance covered by the instructions given, as they necessarily imply that if untrue representations were made by the defendant as of his own knowledge, it was not necessary for the plaintiff to prove that they were made with intent to deceive.

We are therefore of opinion that the plaintiff has no ground of complaint.

Exceptions overruled.

Lothrop v. Thayer.

(138 Mass. 466.)

Negligence — landlord and tenant — tenant burning premises.

A tenant of part of a building, the other part of which is occupied by his landlord, and in both parts of which there are chattels of the landlord, is liable for the accidental destruction of the landlord's part and its contents by fire caused by his negligence in heating his own part; but he is not liable for the destruction of his own part unless he was recklessly negligent; and as to the landlord's chattels in his own part it depends upon the nature of the bailment.

ACTION for destruction of a building and personal property. The head-note shows the case. The plaintiff had judgment below.

R. M. Morse, Jr., & H. L. Harding, for defendants.

A. Churchill & G. O. Shattuck, for plaintiff.

FIELD, J. The property destroyed or damaged by fire was, first, the portion of the building let by the plaintiff to the defendants or to one of them; second, the remaining portion of the building belonging to the plaintiff and in his possession, and third, personal chattels of the plaintiff in part in the portion of the building let, and in part in the remaining portion. The liability of the defendants for the damage to the personal chattels stored with them must be determined by the degree of care required of such bailees as they were, and although there has been much criticism upon the use of the words "gross," "ordinary," and "slight," as applied to negligence or care, it seems established that different degrees of care are

required of different kinds of bailees, by whatever form of words the degree of care required may be expressed. The liability of the defendants for the damage to the personal property in the portion of the building in the possession of the plaintiff must be the same as their liability for the damage to that portion of the building, and this is the liability which every occupant of a building is under for a fire originating in it which extends to and injures the property of his neighbor. Assuming both defendants to be tenants of the plaintiff, their liability for the damages to the portion of the building let to them is the liability of tenants at will to their landlord.

The defendants requested an instruction that they were not liable for mere negligence, which was refused; and the court instructed the jury, that "if the fire was caused by their negligence," they would be liable, which means liable for the whole loss.

It is said, that by the ancient common law, if a fire is kindled in a house by the occupant, or by his servant, or any member of his household, or his guest, and it spreads to his neighbor's property and destroys it, he shall make good the loss. It is not certain however that the action did not proceed on the ground of negligence, either presumed or proved. *Beaulieu* v. *Finglam*, Y. B. 2 Hen. IV, fol. 18, pl. 6; *Althorf* v. *Wolfe*, 22 N. Y. 355, 366; *Filliter* v. *Phippard*, 11 Q. B. 347; *Tuberville* v. *Stamp*, 12 Mod. 152; 1 Salk. 13; 1 Ld. Raym. 264; *Anon.* Cro. Eliz. 10; *Smith* v. *Brampston*, 2 Salk. 644; 1 Ld. Raym. 62; 5 Mod. 87; Com. Dig. Action upon the Case for Negligence (A), 6; Bac. Abr. Actions on the Case (F); Rolle's Abr. Action sur Case (B) Fire; Gale Easem. (5th ed.) 398–419; 1 Bl. Com. 431; Add. Torts (3d. ed.), 240–243; Gibbons Dilapidations and Nuis. (2d ed.) 99–102, 133–148.

By the Stat. of 6 Anne, ch. 31, § 7, no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall, from and after the said first day of May, accidentally begin, etc. Section 9 of the act provided, "that nothing in this act contained shall extend to, defeat or make void any contract or agreement made between landlord and tenant."

By the Stat. of 14 Geo. III, ch. 78, § 86, "no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall, after the said 24th day of June,

accidentally begin," etc., "provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void." These statutes did not extend to the Colonies, although one or both were adopted by some of them; they were not adopted by Massachusetts. From the passage of this statute of Anne there are no English cases for 130 years, and the opinion of lawyers seems to have been that the statute covered fires caused by negligence as well as by accident. The Stat. of Geo. III, being the statute then in force, was construed in *Filliter* v. *Phippard, ubi supra;* and it was held that a fire intentionally kindled by the defendant or his servant on his land, and negligently guarded, was not an accidental fire within the meaning of the statute. The rule in this Commonwealth has always been, that negligence is the foundation of the liability, and that the defendant is liable for the want of ordinary care; but the cases here are all of fires set on land for the purpose of clearing it or for other purposes. *Barnard* v. *Poor*, 21 Pick. 378; *Tourtellot* v. *Rosebrook*, 11 Metc. 460; *Higgins* v. *Dewey*, 107 Mass. 494; s. c., 9 Am. Rep. 63.

The few cases which are reported, in which it was sought to hold the defendant liable for the negligent acts of his servants in kindling or guarding fires in buildings, show a tendency on the part of courts to rule strictly upon the liability of masters for the acts of their servants. *M'Kenzie* v. *M'Leod*, 10 Bing. 385; *Williams* v. *Jones*, 3 H. & C. 256, 602; see *Wood* v. *Chicago, Milwaukee & St. Paul Ry.*, 51 Wis. 196.

The case which most nearly resembles the one at bar is *Read* v. *Pennsylvania Railroad*, 15 Vroom, 280. The plaintiff's building and its contents had been destroyed by a fire beginning in the defendant's building, used for the storing of tools, oil and waste, and spreading to and consuming the building of the plaintiff. In the defendants' building was a stove, the heat of which was necessary to preserve the fluidity of the oil in cold weather. On the morning when the fire occurred, the defendant's servants, who had used the oil cans, had left the house locked, with a fire in the stove. There was evidence that the stove was red-hot, and that there were not only oil cans around the stove, but an oil can on the top of the stove. The court said: "I think the jury could conclude that the servants of the defendants did not exercise the caution of persons of ordinary prudence under these circumstances. I think that no prudent person would leave unattended a red-hot stove, or a stove with its

draft damper open, by reason of which it would speedily become red-hot, upon which stove was standing a can of oil, and around it was scattered inflammable waste." And the court declined to set aside a verdict for the plaintiff, on the ground that there was evidence of negligence. It may be thought perhaps that the evidence showed more than a want of ordinary care, although that seems to have been the standard adopted by the court.

Most fires originating in buildings are undoubtedly due to negligence in the construction, or to a want of repair, or to the bad condition of the building, chimneys, or heating apparatus, or to negligence in the management of the building or of the fires in it, and to require the occupants at their peril always to adopt all improvements which are practicable, and to take all reasonable precautions which science can suggest to prevent fires, or the spread of fires, would be intolerable; yet such has sometimes been held to be the rule of law for railroad companies in the construction and management of their locomotives, when their liability depends upon negligence, and for manufacturing companies using large chimneys in the construction and management of their chimneys and works.

The old English common law was thought to be hard; *Smith* v. *Brampston, ubi supra;* and the English statutes were passed. In 1843, Lord Chancellor LYNDHURST said: "I may further observe, that although cases of damage from the burning of houses occasioned by negligence have doubtless frequently occurred since the statute (of Anne), I do not recollect, in the course of a pretty long professional life, any instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding." *Canterbury* v. *Attorney-General,* 1 Phil. 306. *Vaughan* v. *Menlove,* 3 Bing. N. C. 468, and 4 Scott, 244 (1837), decided that negligence in constructing and guarding a hay-rick on the defendant's land, by the spontaneous ignition of which the plaintiff's house was burnt, was actionable if the fire was occasioned by gross negligence of the defendant, although the statutes were not mentioned, and by gross negligence was meant the want of that care which a person of ordinary prudence would exercise, and since *Filliter* v. *Phippard, ubi supra* (1847), the rule seems to have been regarded as established in England, that an action lies for the want of ordinary prudence in kindling or guarding a fire whereby the property of an adjoining owner is injured. This seems to be the universal American rule, but all the cases, with

three or four exceptions, are of fires kindled on land, and not in a building. It does not seem to have been considered whether any distinction can be taken between a fire lawfully kindled on land for clearing it, or for other purposes, and a fire kindled in stoves, fireplaces, or chimneys for the purpose of heating a building in the manner in which by its construction it was intended to be heated. It must however, we think, be regarded as too well established to be overturned by judicial decision, that the occupant of a building is responsible to the owners of adjoining property for the want of ordinary care on the part of himself or his servants, acting within the scope of their employment, in kindling or guarding the fires used for heating the building.

The distinction between the liability of a tenant at will to his landlord, and of an occupant to his adjoining proprietors, for damage by fire, is sharply drawn in *Panton* v. *Isham*, 3 Lev. 359. On special verdict, it was found that the plaintiff was seised of six stables, and demised one to the defendant, for a week, for eight shillings, and so from week to week at eight shillings per week, as long as both parties should please, and demised the other five stables to other persons for divers terms yet to come, whereby they were possessed, and the fire by the defendant's negligence six weeks afterward began in the stable demised to the defendant, and burnt the same and all the other stables, and it was held, "that for the stable demised to the defendant himself, no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 13, *Countess of Salop's* case. But thirdly, as to the stables demised to the others, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and defendant, but as to them they are as nothing."

At common law, a tenant for life, or for years, or at will, was not liable for waste, but tenants for life or years were made liable by the statute of Marlebridge, 52 Hen. III, chap. 23, and by the statute of Gloucester, 6 Edw. I, chap. 5; 2 Inst. 144, 299; Co. Lit. 53 *a*, 53 *b*; *Sackett* v. *Sackett*, 8 Pick. 309. A tenant at will was not within these statutes, and it was held, that although a tenant at will might be liable to his landlord in an action of trespass for voluntary waste, no action would lie for permissive waste. Co. Lit. 57 *a*, note; *Daniels* v. *Pond*, 21 Pick. 367. Our statutes give an action of

waste, or of tort in the nature of waste, against a tenant in dower, by the curtesy, or for life or years, but not against a tenant at will. Pub. Stats., chap. 179, §§ 1, 3.

It was early decided, that if a tenant at will negligently kept or guarded his fire, whereby the house was burned, this was permissive waste, for which he was not liable to his landlord. *Countess of Shrewsbury's* case, 5 Rep. 13 b, was this: The Countess of Shrewsbury brought an action in the case against Richard Crampton, a lawyer of the Temple, and declared that she leased to him a house at will, and "*quod ille tam negligenter et improvide custodivit ignem suum, quod domus illa combusta fuit,*" etc.; "and it was adjudged that for this permissive waste no action lay." *Countess of Salop* v. *Crompton*, Cro. Eliz. 777, 784, was an action on the case, and the declaration was, that the defendant, being in possession of a house, stable, and three barns as tenant at will, "*tam negligenter et improvide* kept his fire in the said house, that through default of good keeping thereof, the said house, stable and barns were burnt down," etc.; and it was held "that for the negligent burning, this nor any other action lies." See Y. B. 48 Edw. III, 25, pl. 8.

The reasoning of these old cases is undoubtedly technical, but they were decided with full knowledge that an action lay for an injury to a personal chattel, caused by the negligent keeping of the bailee. *Countess of Shrewsbury's* case, *ubi supra.* It is admitted to be the law, that a tenant at will is not liable for permissive waste. *Harnett* v. *Maitland*, 16 M. & W. 257; *Moore* v. *Townshend*, 4 Vroom, 284; *Coale* v. *Hannibal & St. Joseph R.*, 60 Mo. 227.

But it is suggested that these defendants, under our statutes were not tenants at will within the meaning of the rule; and it is denied that the careless and negligent acts of the defendants, whereby the building was burnt, constitute permissive waste. The defendant's estate, not being created by an instrument in writing, had under the Gen. Stat., chap. 89, § 2, the force and effect of an estate at will only; and it is therefore unnecessary to determine a question which has been somewhat disputed, whether tenants from year to year are liable for permissive waste. The burning of a building through the negligent keeping of a fire by a tenant is by modern text-writers regarded as permissive waste. 4 Kent Com. 81; 1 Add. Cont. (8th ed.) 253; Add. Torts, 239; Smith Ld. & Ten. (3d ed.) 287; Taylor Ld. & Ten., § 349; Gibbons Dilapidations (2d ed.), 108, 128; Comyn Ld. & Ten. 171.

The diligence of the counsel for the plaintiff has not shown us any case in which it has been held that a tenant at will is liable to his landlord for injuries occasioned by his negligence in kindling or keeping fires in stoves, fire-places or chimneys intended to be used for heating the premises. Such a case is presented in *Scott* v. *Hale*, 16 Me. 326, but the defendant had a verdict. The degree of care which the ruling at *nisi prius* required was that of "a discreet, prudent, and careful man in the possession of his own premises." Of this the court say, "We think this was a most liberal instruction in favor of the plaintiff. But we forbear now to go more minutely into the discussion of questions argued, not because they have not occupied our attention, for they have." The verdict was set aside on other grounds.

In the case cited of *Parrott* v. *Barney*, Deady, 405; s. c. on appeal, 1 Sawy. 423, the tenancy was from year to year, and the damage was from explosive substances stored in the building. There is nothing in *United States* v. *Bostwick*, 94 U. S. 53, or in *Robinson* v. *Wheeler*, 25 N. Y. 252, that decides that a tenant at will is liable to his landlord for the burning of the building let, caused by negligence in guarding a fire kindled for the purpose of heating the building.

The law of negligence has been largely developed in recent times, and it is argued that there is no sound reason why it should not be applied in the same manner to real property as to personal, and to tenancies at will as well as to tenancies for a term. It may well be doubted whether the existing condition of the law of negligence is altogether satisfactory, and whether it would be wise to establish an unlimited liability to his landlord, on the part of every tenant at will of real property, for every injury occasioned by any act of negligence of himself or his servants, in the use of the property. However this may be, we do not feel at liberty to overturn long-established rules of law governing real property.

We are not in this case required to consider the consequences of the negligent setting or guarding of fires, set for other purposes than such as are necessary to render the tenement fit for occupation, and in other places than those constructed or intended for the use of fires in heating the premises let. It is competent for landlords and tenants to make in writing any stipulations they see fit. When there is no writing, and the tenant takes the precarious estate of a tenancy at will, we think it has been generally understood that

the tenant is not liable for the burning of the tenement let, occasioned by his negligence or that of his servants in the keeping of fires set for the purpose of heating the premises, and in the places designed for that purpose, so that they may be fit for occupation. The fact that no action can be found to have been maintained for this cause is strong evidence of this. The ancient law has been acquiesced in, and consciously or unconsciously, the cost of insurance to the landlord, or the value of the risk, enters into the amount of the rent. We think on this part of the case the exceptions should be sustained.

If the law were to be established anew, it might with much force be contended that the test of the liability of the defendants in this case ought to be the same as to all of the property destroyed; but it would deserve consideration whether, in such a case as this it would not be more reasonable to hold the defendants liable only for gross negligence amounting to reckless conduct.

The existing law has however introduced many distinctions. A bailee of chattels for hire is liable only for the want of ordinary care; but if the bailee promises to return the chattel absolutely, then he is liable, although the chattel is destroyed by inevitable accident. *Harvey* v. *Murray*, 136 Mass. 377.

The obligations of tenants under a written lease to their landlords, except so far as statutes have imposed arbitrary liabilities, are determined by the construction of the lease. But landlords are at common law exempt from many liabilities toward their tenants for the condition of the premises, which they are under toward strangers who are lawfully upon the premises while in their possession. *Bowe* v. *Hunking*, 135 Mass. 380; s. c., 46 Am. Rep. 471; *Woods* v. *Naumkeag Steam Cotton Co.*, 134 Mass. 357; s. c., 45 Am. Rep. 344.

Disregarding the use of fire in clearing land and for other agricultural purposes, and confining ourselves to the case at bar, which is the use of fire in stoves for the purpose of heating the building, it is manifest that in many cases prudence might require a reconstruction of the chimneys and the purchase of new stoves. In many cases, it would be difficult to determine how far the bad condition of the premises contributed to the injury occasioned by the fire. We think the reasonable rule is, that if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease, with proper covenants; and that a tenant at will

is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; but that he is liable for wilful burning, and also for such gross negligence as amounts to reckless conduct. By the terms of the report, the verdict is to be set aside, and a new trial granted.

New trial granted.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

PEOPLE v. MAJORS.

(65 Cal. 138.)

Criminal law — murder — of two at once — bar.

Where two are murdered by the same act, conviction or acquittal as to one does not bar a prosecution to the other.

CONVICTION of murder. The opinion states the case.

J. B. Lamar, for appellant.

Marshall, attorney-general, and *Campbell*, district attorney, for respondent.

MORRISON, C. J. The defendant was prosecuted by information filed in the Superior Court of Santa Clara county, for the murder of one Archibald McIntyre, and a change of venue having been granted him to the county of Alameda, he was tried and convicted there of the crime of murder in the first degree. The appeal is from the judgment against him in the first-named court on the plea of former conviction, as well as from the judgment on the final trial in the county of Alameda, and brings before us for review all the orders and proceedings in the case in both courts.

The importance of the case, as well as the zealous and able manner in which it has been presented, demands from us a careful consideration of all the questions involved.

The first and most important point to be considered is the plea of a former conviction; and for a full and distinct understanding of the trial on that plea we will consider the facts upon which it was submitted to the jury, as the same are found in the following stipulation:

STATEMENT OF FACTS.

"I. That the defendant, Lloyd L. Majors, is the identical Lloyd L. Majors who was a defendant in the information filed in this court on the 30th day of March, 1883, charging Joseph Jewell, John Showers and Lloyd L. Majors with the crime of murder in the killing of one William P. Renowden at the said county of Santa Clara on the 11th day of March, 1883.

"II. That under said information of March 30, 1883, said Lloyd L. Majors was duly arraigned, and on the 2d day of April, 1883, plead 'not guilty,' and was put upon his trial; that on the 27th day of May, 1883, the jury returned into said court a verdict in the following words, etc.:

"'The Superior Court, county of Santa Clara:

"'The People of the State of California *versus* Lloyd L. Majors, defendant.

"'We, the jury in the above-entitled cause, find the defendant, Lloyd L. Majors, guilty of murder in the first degree, with imprisonment for life in the State prison.

"'JOHN CARRICK, foreman.'

"III. That in pursuance of the above verdict the court on the 2d day of June, 1883, pronounced upon said Lloyd L. Majors judgment of imprisonment for life in the State prison at San Quentin, and said judgment is final and in full force.

"IV. The facts shown by the evidence upon the said trial under said information of March 30, 1883, and upon which said Majors was convicted as aforesaid, are as follows: That said Lloyd L. Majors counseled and advised one Joseph Jewell to rob one William P. Renowden, living near Lexington, in the said county of Santa Clara, on the 11th day of March, 1883; that on said day said Jewell repaired to said Renowden's house, taking with him one John Showers; that said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was

then residing with said Renowden; that in the attempt to carry out the design of robbery, both said Renowden and said McIntyre were there and then at the same point of time, to-wit, about 6:30 o'clock P. M., of the 11th day of March, 1883, killed by said Jewell and Showers.

"V. Said Majors was not present, neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counselling and advising said Jewell to commit said robbery as aforesaid.

"VI. The foregoing evidence and facts are substantially the evidence and facts adduced upon the trial of said Lloyd L. Majors upon the trial heretofore had in this court, upon said information, for the murder of William P. Renowden, and which are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction, should the same be put in issue by a plea of not guilty.

"VII. It is stipulated and agreed by the plaintiffs and the defendant, as follows: The foregoing statement of evidence and facts is hereby admitted to be true, solely for the purpose of determining the issue now pending in this court on the plea of former conviction, and shall be read in evidence on the trial of said issue as the evidence of the case, together with the record of the case of The People against Lloyd L. Majors for the murder of William P. Renowden, heretofore tried in this court, consisting of the judgment-roll and the minutes of the court in said cause."

The defendant was first prosecuted for and convicted of the murder of said Renowden, and as it is stipulated in the agreed statement of facts on which he was tried in the present case on his plea of former conviction, that Renowden and McIntyre were "at the same point of time, to-wit, about 6:30 o'clock, P. M., of the 11th of March, 1883, killed by said Jewell and Showers," it is therefore claimed that defendant has been once in jeopardy, and cannot now be prosecuted for the murder of McIntyre. In support of this ground of defense defendant relies upon numerous adjudged cases, and it must be conceded that the general principle is too well established to admit of controversy, that the law will not allow the people to maintain a second prosecution after a former trial and conviction or acquittal of a party for the same offense. The cases most strongly relied upon, on the part of the defense, we will now proceed to examine.

The first is the case of *State* v. *Damon*, 2 Tyler, 387, in which it appeared that the defendant had, in the same affray and by the same stroke, cut two persons, and having been convicted of wounding one of the parties, it was held that the plea of *autrefois convict* was well pleaded to an indictment for wounding the other. In delivering the opinion of the court, the learned judge says: "The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot therefore be again held to answer in this court for the same offense." On the theory that both indictments were for "the same breach of the peace," and not for wounding two persons by the same wrongful act, the case may be harmonized with authorities which will be hereafter referred to in this opinion. Another case relied on is that of *State* v. *Cooper*, 13 N. J. L. 361. The defendant was indicted for the crime of murder, committed in feloniously setting fire to and burning the dwelling-house of one Ralph Smith, in which was one Joseph Hooper, who was burned to death. To the indictment defendant interposed the plea of former conviction on an indictment for the crime of arson, committed in setting fire to and burning the same dwelling-house. The plea was sustained, and the court in its opinion says: "It is a maxim of the common law that no man is to be brought in jeopardy of his life more than once for the same offense. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*. The writers on the subject concur in stating that these pleas must be upon a prosecution for the same identical act and crime. 3 Bl. Com. 336; Chitty Cr. Law, 452, 462. 'But,' says Chitty, p. 455, 'it is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one would show that the defendant could not have been guilty of the other.' Thus, a general acquittal of murder is a discharge upon an indictment for manslaughter on the same person, because the latter charge was included in the former. * * * At first view it appears as if there were two crimes distinctly indictable and punishable. But our sense of justice is shocked by the idea that a man shall be convicted and punished for the arson, with that measure of punishment which the laws mete out to those guilty of that crime, and that afterward for a perfectly accidental and involuntary killing

he shall be liable to the same punishment of death, which is inflicted on the willful and malicious murderer. In the case before us, the killing was a simple consequence of the burning, and there is no pretense that it was in point of fact intentional." We have quoted from the opinion at some length to show how far it bears upon the case we are now considering.

A third case is that of *Clem* v. *State*, 42 Ind. 420; s. c., 13 Am. Rep. 369, in which DOWNEY, J., delivering the opinion of the court, says: "It does not follow because one of the indictments was for the murder of Nancy Jane Young, and the other for the murder of Jacob Young, that the crime is not the same. If the same act of the defendant resulted in the death of both of them, there was but one crime. When by the discharge of a firearm, or a stroke of the same instrument, an injury is inflicted upon two or more persons, or their death is produced, there is but one crime committed." This case is an authority in favor of the defendant, if as his learned counsel contends, the stipulation means that the deaths of Renowden and McIntyre resulted from one and the same act — a question which we will consider hereafter.

The cases of *Copenhaven* v. *State*, 14 Ga. 8, and *Holt* v. *State*, 38 Ga. 187, are also cited on behalf of the defendant, and it is there said that "the plea of *autrefois acquit*, or *convict*, is sufficient whenever the proof shows the second case to be the same transaction with the first." The question how far the authority of these cases agrees with other kindred cases depends on what is meant by the word "transaction."

The foregoing review of the cases relied on in support of defendant's plea of former conviction will suffice for the purposes of this opinion, and we will now proceed to the examination of some of the cases cited by the prosecution.

It is claimed that the case in 42 Indiana has been overruled by the same court in the two later cases of *State* v. *Elder*, 65 Ind. 282; s. c., 32 Am. Rep. 69, and *State* v. *Hattebough*, 66 Ind. 223. In the first case (reported in 65 Ind.), the rule on the subject we are now treating is stated as follows: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second prosecution would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." And in the other case (66 Ind.) it is said: "The

usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case."

Testing the case of *Clem* v. *State, supra*, by the rule laid down in the later cases referred to (65 and 66 Ind.), it would be difficult to sustain the authority of the former. Clem, being indicted and prosecuted for the murder of Nancy Young, could not, on such indictment and prosecution, have been convicted of the murder of another person, to-wit, Jacob Young, nor *vice versa*. Indeed, on an indictment for the murder of one of the Youngs, evidence on the part of the prosecution tending to prove the murder of the other would have been wholly inadmissible on general rules of evidence.

We now come to cases on the other side, more directly in point. The first case to which we will refer is that of *State* v. *Standifer*, 5 Port. 523, in which it appears that two persons, John W. F. Long and Lei A. Long, were injured, one killed and the other wounded, by the defendant, at the same time and in the same transaction. For the murder, the defendant was tried and acquitted, and on the trial for the wounding he pleaded the acquittal in the murder case. The court held the plea bad, and stated the law as follows: "Cases exist in which a minor offense may be discharged by the acquittal of the individual charged, on an indictment for a major offense, but these are cases in which the jury trying the case could have lawfully returned a verdict for the lesser crime. Thus an acquittal for murder would be a bar to an indictment for manslaughter. So of a burglary, when the same indictment included a charge of larceny, an acquittal would be a complete bar. But the reason in such cases is that the jury could, if the evidence was satisfactory, have convicted the offender of the lesser criminal charge. In the present case, no question can possibly arise as to the law. The offenses have no appearance of identity; they could not be included in the same indictment, and the evidence which would produce an acquittal of the one might produce a conviction of the other."

The next case is that of *Teat* v. *State*, 53 Miss. 439, where it was held, that "T. and S. lying in ambush together each armed with a double-barreled shot gun, two distinct, but almost simultaneous shots were fired from the ambush, by which G. and W. were mortally wounded, and S. fired a third shot in the prostrate body of G., that

the murder of G. was a distinct crime from that of W., and that for each of the offenses T. might be separately tried; nor could he on an indictment for the murder of W., successfully plead former jeopardy in having been already tried for the murder of G. A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for one of them first had." The learned judge further says: "It is believed that no well-considered case can be found, where a putting in jeopardy for one act was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them."

In *Vaughan* v. *Com.*, 2 Va. Cas. 273, it was held that "if a person be indicted for shooting S. W. and acquitted thereof, and then indicted for shooting J. W., her plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment." Bishop in his work on "Criminal Law," vol. 1, § 1051, speaking of the identity of offenses, says: "They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or thirdly, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction," etc.

In the case of *Freeland* v. *People*, 16 Ill. 380, it was held "that it was no bar to a prosecution for a riot that one of the accused had been tried and convicted and fined for an assault and battery arising out of the same transaction or offense, and occurring at the same time. A riot may embrace an assault and battery, yet a conviction of the latter cannot be pleaded in bar of a prosecution for the former." See also *Severin* v. *People*, 37 Ill. 414.

In the case of *Com.* v. *Roby*, 12 Pick. 496, the court says that "a conviction upon an indictment for an assault with intent to commit murder cannot be pleaded in bar to an indictment for murder." And further: "Unless the first of the two indictments was such as the prisoner might have been convicted upon, by proof of the facts contained in the second, an acquittal or conviction on the first can be no bar to the second."

In the case of *Burns* v. *People*, 1 Park. Cr. 182, the Supreme Court of New York holds that "to constitute a bar, the offense charged in both indictments must be identically the same, in law as well as in fact." To the same effect is the case of *People* v. *Saunders*, 4 Park. Cr. 196, as is also the case of *Regina* v. *Morris*, 10 Cox C. C. 480.

We might cite many other cases laying down the same principle, but we will content ourselves with the foregoing, and one other case from our own reports. We refer to the case of *People* v. *Alibez*, 49 Cal. 452, where it was held that an "indictment which charges the defendant with the murder of three persons, charges three offenses." The charge was that the defendant administered a poisonous drug, to-wit, strychnine, to three persons at one and the same time, and the trial court was asked to arrest the judgment on the ground that the indictment charged more than one offense, in violation of section 954 of the Penal Code. The court refused to arrest the judgment, and the Supreme Court reversed the case. This is a direct authority on the point we have been considering, and we do not doubt its correctness.

On the trial of the defendant Majors for the murder of Renowden he could not have been convicted of the murder of McIntyre. The two crimes, although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other.

Tested then by the rule laid down in the foregoing cases, the plea of former conviction was not sustained on the trial in the Superior Court of Santa Clara county.

[Minor points omitted.]

No error is found in the case which calls for a reversal of the judgment below, and the same is therefore affirmed, together with the order denying a new trial.

Judgment and order affirmed.

MYRICK, ROSS, MCKEE, THORNTON, MCKINSTRY and SHARPSTEIN, JJ., concurred.

Rehearing denied.

VISALIA v. JACOB.

(65 Cal. 434.)

Adverse possession — of street.

Title to a street cannot be acquired by adverse possession by a private person.*

EJECTMENT. The opinion states the case. The defendant had judgment below.

A. J. Atwell, for appellant.

Oregon Sanders, for respondent.

The COURT. The action is to recover the possession of certain lands, and was commenced November 24, 1883. The complaint avers that plaintiff, on the 27th day of February, 1874, was seised in fee of "all that part of Centre street (describing it), and ever since that time has been, and still is, seised of and entitled to the possession of said land, the same being a portion of a public street duly laid out and dedicated to the public use." That on the 28th of February, 1874, defendant entered into possession of the demanded premises, and thence hitherto has withheld, and still unlawfully withholds, the possession thereof, etc.

Defendant demurred on the ground that the complaint showed the cause of action was barred by the statute of limitations. Defendant also demurred specially that the complaint was ambiguous, unintelligible and uncertain, in that it did not appear therefrom when the lands were laid out and dedicated as a public street. Defendant also demurred generally. The court below sustained the demurrers, and plaintiff declining to amend, a judgment was entered in favor of defendant, from which plaintiff appeals.

If construing the complaint more strongly against the pleader, it only shows that the street was dedicated at some time before the action was commenced, the judgment or order upon the special demurrers was proper. So construing the complaint, it would not appear but defendant had adverse possession for more than five years before the lands were dedicated as a public street. But aside

* See *City of Fort Smith* v. *McKibbin* (41 Ark. 45), 48 Am. Rep. 19.

from the fact that lands actually possessed adversely cannot be dedicated to the use of the public by their owner, the language of the complaint plainly avows that the lands were a public street, laid out and dedicated as such, from the 27th of February, 1874. The rule that an averment is to be taken more strongly against a pleader does not authorize the courts to deprive language of its ordinary signification.

It is urged by respondent, that the fact that the lands were dedicated as a street does not deprive the defendant of the benefit of his five years' adverse possession.

An occupation and obstruction of a public street is a nuisance, and every continuance of that which was originally a nuisance the law considers a new nuisance, to abate which an action may be brought on behalf of the public, or by a private person specially injured. As against such an action, no one can acquire a defense by adverse possession. It was so held with reference to a street over lands not included within those covered by the Van Ness ordinance in San Francisco. *People* v. *Pope*, 53 Cal. 437. It is true an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it. In the latter case the right of the municipality to regulate the public use, and for that purpose to possess, use, and control the property, is treated by the courts as a legal, and not merely an equitable right. Dill. Mun. Corp. (3d ed.), § 662; *San Francisco* v. *Sullivan*, 50 Cal. 603. But it does not follow that such an action is barred by an adverse possession for a statutory period. In *San Francisco* v. *Calderwood*, 31 Cal. 589, it seems to have been held that the ejectment would be barred. But in that case it was found that the "slip" had never been dedicated to the public use. In *Hoadley* v. *San Francisco*, 50 Cal. 275, it was held that as to land granted to the city by certain acts of Congress, and the State legislature, in trust for the public, private persons cannot acquire the right to it by adverse possession. The land there in controversy was "pueblo" land, within the operation of the Van Ness ordinance, etc. But the rule laid down seems to have been understood as applicable to all streets. *People* v. *Pope*, *supra*. After a street has been legally laid out and dedicated, the municipal government retains, or acquires, a right of entry as agent of the public, clothed with the trust and duty of protecting and regulat-

ing the public use. The right of possession is held by the corporation for the benefit of the public, and this right cannot be conveyed to any private person. The lands so held are as effectually withdrawn from commerce while the street continues, as are those spoken of in *Hoadley* v. *San Francisco*. As the municipality cannot convey the title, or relieve itself of the trust, private persons are virtually precluded from acquiring it.

Judgment reversed and cause remanded, with directions to the court to overrule the demurrers to the complaint.

Judgment reversed and remanded.

COTTLE v. SPITZER.

(65 Cal. 456.)

Constitutional law — taxation — "growing crops" — fruit trees.

Fruit trees are not "growing crops" exempted by the Constitution from taxation.

PROHIBITION. The opinion states the case. The writ was denied below.

S. F. Leib, for appellant.

James H. Campbell, for respondent.

The COURT. For the reasons stated in the opinions of the judges of the Superior Court hereto subjoined judgment affirmed.

Petition for rehearing denied.

The following are the opinions referred to:

JUDGE SPENCER'S OPINION.

"Application for an alternative writ of prohibition by the owner of certain lands and fruit trees growing thereon, to prevent the assessors from assessing said trees for the purpose of taxation. The contention of the plaintiff is that this class of property is included in the term 'growing crops,' as found in the Constitution of the State, exempting the last-named class of property from taxation. It is the settled policy of all governments, republican in form, that the burdens of taxation shall fall equally upon their

citizens. Where resort is had to direct *ad valorem* taxes for the purpose of revenue, in order to carry out both the letter and spirit of that policy it becomes necessary that property should be assessed for taxation, not only according to a just and uniform standard of value, but that all property should be thus assessed and taxed; for if the property of A. is taxed, and that of B. is left to go untaxed, it is manifest that the burdens of taxation have been very unequally imposed upon the people. Consonant with this principle, which is a corner-stone in the structure of a free government, the Constitution of the State provides that 'all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law.' And in order that there should be nothing left to construction whereby any particular kind of property may escape payment of its just proportion of taxes, it is added: 'The word property, as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and chings, real, personal and mixed, capable of private ownership.' Art. 13, § 1. Upon such constitutional provision, set forth in all its fullness, iterating a cardinal principle of justice, is engrafted the apparent exception thereto 'that growing crops * * * shall be exempt from taxation.' It is a rule of construction of uniform application that he who seeks to avail himself of the benefits of an exception to a general rule or provision, must show with reasonable clearness that he has brought himself within the terms of its qualifying clauses. He can take nothing by implication, and all the intendments are against him. Thus premising, we proceed to inquire the meaning of the term 'growing crops,' as used in the organic law. 'Crop,' as defined by Webster, is: '3d. That which is gathered; the corn or fruits of the earth collected; harvest. The word includes every species of fruit or product gathered from man or beast. 4th. Corn or other cultivated plants while growing [a popular use of the word]. 5th. Any thing cut off or gathered.' The etymology of the word 'crop' appears to be from the Saxon 'crop' or 'cropp,' signifying the crop of a fowl, a cluster of ears of corn, grapes, ears of corn; and from the Welsh, 'copiad,' a gathering or taking hold of. Webster, *verb.* crops.

"The definition given by Webster is even broader than the popular signification of the word. Under the former, as we see, not only is meant grain produced from annual vegetation, but also

fruits from trees and perennial plants. But it is at least doubtful if under the common and restrictive acceptation of the term, any thing more would be understood than products from annual plants, as cereals, maize, etc., and the latter appears to be the sense in which the term is employed in technical legal parlance. 'Crops,' says Bouvier, 'is nearly synonymous with emblements,' and by that term is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly, and are raised by the annual expense and labor or 'great manurance and industry,' such as grain; but not fruits which grow on trees, which are not to be planted yearly, or grasses and the like, though they are annual.' Bouv. Law Dict., word 'emblements.' It may be conceded, and correctly, that at the present day, in this State at least, the word 'crop,' taken in its most comprehensive sense, includes fruits grown on trees, but I think it can be affirmed without serious contradiction that trees themselves, capable of producing fruit, never have been included in that term. As I understand the able and ingenious argument of the learned counsel for plaintiff, he does not claim that *ex vi termini* the words 'crops' or 'growing crops' include fruit-bearing trees, but because the Constitution declares that 'growing crops shall not be taxed, and inasmuch as the fruit growing upon the trees is a growing crop,' and the tree is necessary for the production of the fruit, and is substantially valueless for any other purpose, therefore the taxing of the tree is in effect taxing the crop growing or that may thereafter grow thereon, because *arguendo* there being no tree, there could be no crop. In furtherance of the theory thus advanced the elementary principle is invoked that whatever is forbidden to be done by direct means will not be permitted to be accomplished by indirection. A familiar application of this principle is the unsuccessful attempt sometimes made by State legislatures to evade the provisions of the Constitution of the United States, forbidding the several States from imposing duties on imports and exports. *Brown* v. *Maryland*, 12 Wheat. 444; 24 How. 123; 15 Penn. St. 353. In the cases cited, it was held that the imposition of a license tax by the State upon a person engaged in importing goods as such, or requiring the payment of stamp tax upon bills of lading of gold or merchandise exported from the State, was in effect and by indirect means taxing the goods imported or exported by those instrumentalities. It was necessarily a burden upon the goods themselves; but I fail

to see the applicability of the principle invoked to the subject under consideration. If a tree is not in fact a part of the crop of fruit growing thereon, I do not understand how it can be made to appear that the taxing of the former is substantially and in effect taxation of the latter. Perhaps some confusion might be avoided in dealing with this question if it be borne in mind that a crop when perfected does not fall within any exemption or exception, and is the subject of taxation. By the very terms of the Constitution, the exemption of crops from taxation is temporary, and only continues during its growing state. We have then an article of property — a tree — that year by year produces another article of recognized value, and which is taxed from the time it comes to perfection as long as it continues in existence, how can it be said that taxing of the matrix is illegal, or even unjust when its product is also taxable. I can understand that the system of reasoning sought to be enforced by the plaintiff might have weight if the product of the tree could not at any time, or under any circumstances, be taxed. If the only use to which an article can be put, and therefore the only value it has, is to produce untaxable property — it might with reason be claimed that the article cannot have any taxable value.

"In the wide range taken in the argument of this case, much was said in relation to the beneficent policy of the law in encouraging certain branches of industry by exemption from taxation, and that such supposed exemption should be encouraged, and passages in the organic law so construed as, if possible, to effectuate that object. The disposition of the question involved does not require an examination into the expediency or inexpediency of that kind of enactment, but it may not be out of place to here remark that if the correct principles of free government require that taxation should be equal, it is at least possible that the advantage gained in the direction of fostering a particular industry or set of industries at the expense of others, may be outweighed by the general injury resulting in the downfall of one of the pillars of the temple of liberty. In conclusion, it may be suggested that it is even doubtful if the framers of the present Constitution intended to exempt any private property from taxation. As we have seen, the section already referred to commences with a sweeping declaration that all private property shall be taxed, which is followed by the provision that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or muni-

cipal corporation within this State, shall be exempt from taxation. It will be noticed that all property referred to, except growing crops, is such as belongs to government, either Federal or State, and therefore is not in its nature taxable. In enumerating it no attempt is made to exempt property otherwise taxable, and in relation to the single item of 'growing crops,' my conclusion is that it is in effect a declaration that it is not sufficiently tangible to be treated as property; it is in a transitory state, starting with the embryo and ending with the matured product, at no two consecutive points of time in the same condition. To attempt to place upon it any money value, would be to indulge in the merest guess-work. It has been held by the Supreme Court of this State that a lessee of land is the owner of a so-called growing crop, although his husbandry has extended only to the preparation of the soil for the reception of the seed; that it is a potentiality before any seeds are sown which is subject to a valid mortgage under the law authorizing the mortgaging of growing crops. *Arques* v. *Wasson*, 51 Cal. 620. I apprehend it would puzzle the most experienced appraiser to fix a value upon it, or to even recognize it as property. The fact is undeniable, that land planted with orchard trees is ordinarily more valuable than the naked soil. From a legal standpoint, the land and the trees growing thereon are, together, but one piece of real estate, and might with propriety be assessed as such in gross. The legislature has seen fit however, to require the land and trees to be assessed separately. This it has the constitutional power to do, and no hardships can result from such a course if each is fairly valued, and the total value is not increased thereby. I am of the opinion that it is the duty of the assessor to assess fruit, nut-bearing and ornamental trees, and vines not of natural growth, as directed in section 3617 of the Political Code. It results that the writ prayed for should be refused, and it is so ordered."

Writ refused.

[Judge BELDEN'S opinion omitted.]

WILCOXSON v. STITT.

(65 Cal. 596.)

Vendor and purchaser — "agreement to be void" — enforcement.

Where an agreement for the sale of land is conditioned to be void if the vendee shall fail to fulfill, and the vendee so fails, the vendor may treat it as void or as in force.

ACTION for purchase-money of land. The opinion states the case. The defendant had judgment below.

Treadwell & Van Fleet, for appellant.

I. S. Belcher, for respondent.

THORNTON, J. This action was instituted on a contract between plaintiff of the first part and defendant of the second part, expressed in articles of agreement, by which plaintiff agreed to sell to defendant a tract of land for the sum of $18,480. Of this sum defendant paid one-half, and agreed to pay the remaining half on or before the 21st day of March, 1878, together with interest from the date of the contract at the rate of ten per cent per annum. The defendant also agreed to pay all State, county, township, district, road, and levee taxes that were due when the contract was executed, or that thereafter might become due on the land sold.

The following stipulations also constitute a part of the contract:

"In the event of failure to comply with the terms and all the conditions hereof by the party of the second part, the party of the first part shall be released from all obligations, either in law or equity, to convey said property or any part thereof, and the said party of the second part shall forfeit all right thereto, and this agreement shall be void.

"And the said party of the first part on receiving such payments, at the time and in the manner above mentioned, shall and will make, execute and deliver to the said party of the second part a deed for all his right, title, claim, and interest in and to said lands, hereinbefore described and mentioned."

The action was brought to recover the sum last mentioned in the contract, with interest, etc. Prior to bringing this action

plaintiff tendered a deed such as was required by the agreement, and at the same time demanded payment of the sum sued for with interest as set forth in the contract. Defendant refused to receive the deed or pay the money.

The facts above mentioned, together with other facts not material to the determination of the cause, were found by the court below. Judgment was rendered for defendant and plaintiff appealed.

It is contended here by counsel for respondent to sustain the judgment, that under the provisions of the agreement between the parties hereto, on the failure of the defendant to pay the sum sued for with interest, on the 21st of March, 1878, the agreement became wholly void, that both parties were thereupon released from all obligations under it, and that no action could be maintained on it.

On this point we are referred to no pertinent authority by the respondent. *Gordon* v. *Swan*, 43 Cal. 564, has no application. The cases cited on behalf of appellant hold that such an avoiding clause as the one in the agreement before us is for the benefit of the vendor, that he has an option to avoid the agreement or enforce it, and that the vendee cannot take advantage of his own failure or neglect and avoid the agreement. *Mason* v. *Caldwell*, 5 Gilm. 196, was an action brought by the vendor against the vendee to recover on certain notes given under the provisions of a contract of purchase of land evidenced by a bond. In that case the question arose as to the meaning of a clause in the bond, in these words: "But should the said John R. Caldwell or his assignee fail to pay the said sum of money, specified in said notes, within ten days after the same become due, he thereby forfeits all claims to said lots and all the moneys paid thereon, and this bond, in such event, shall be void both in law and equity, and the title to said lots shall continue in the original proprietor, as if no sale had been made."

As to this the court said: "The defendant contends that he can take advantage of this clause, and because he did not pay the money as he had agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor should have the same privilege. This argument refutes itself. It is as much a *felo de se*, as it would make the bond. To admit the defendant's position is to leave everything in his own hands. It allows him to defeat, or make the bond operative, as

may best subserve his interest, without any discretion on the part of the obligee. It converts the bond into a naked proposition, absolutely binding on the seller, but which the purchaser may accept or reject by the payment or non-payment of the money. By thus putting the entire control in the hands of the latter, all mutuality is destroyed. It was the undoubted intention of both parties, when they inserted this clause, to provide a penalty to insure a prompt performance by the purchaser. By performance he leaves no discretion in the hands of the obligee, but has a right to enforce the bond, while if he does not, he agrees to leave it optional with the other party to avoid the contract or not. Here was a real mutuality, for the purchaser had the first discretion, and if he placed himself in the power of the party, it was by his own voluntary neglect to pay the money as he had bound himself to do, and it was but a just penalty for violating his obligation. But this is not a case of first impression. This precise question has been fully settled by a number of decisions in other States. The first case to which we shall refer is that of *Canfield* v. *Westcott*, 5 Cowen, 270, and two other cases are given in a note to that, where the same court had held the same rule; in the last of which, *Church* v. *Ayres*, almost the identical words are used which are found in the avoiding clause of this bond: 'Otherwise, these presents to be void both in law and equity.' In all of these cases the court held that the avoiding clause was inserted for the benefit of the obligee, and that the obligor could not take advantage of his own neglect in the non-payment of the consideration. The same construction was given to a similar clause in the case of *Manning* v. *Brown*, 1 Fairf. 49. The same principle was sustained in Kentucky, in *Barbour's Ex'r* v. *Brookie*, 3 J. J. Marsh. 511."

Canfield v. *Westcott*, 5 Cow. 270, was an action of covenant on articles of agreement under seal, to recover certain installments of the purchase-money. In that case, the following clause in the articles came under consideration: "The said Daniel (the defendant) hereby agrees that should he fail in performing any part of the above covenants, that this contract shall become void, and of no effect; and that the said party of the second part (the testator) shall and may re-enter and take possession of the said premises, without hindrance or molestation." The court said: "The provision that this agreement should be void was for the benefit of the vendor. On the vendee's default, the vendor might therefore con-

sider the agreement void at his own election; or affirm it and bring his action on the covenants," and they said this had been often so held in much stronger cases; as where the provision in the articles was general and positive, in the words of both parties, that if the vendee failed to perform, the contract shall be void.

In the report of *Church* v. *Ayens*, 5 Cow. 273, SAVAGE, C. J., who delivered the opinion of the court, said: "The very point now raised was decided by this court on the same state of pleadings in *Van Rensselaer* v. *Fitch*. The case is not reported, but I have been favored by the late chief justice with the demurrer book and the decision of the court. Van Rensselaer sued Fitch on an article of agreement as follows: 'First, the said party of the second part (Fitch) agrees to purchase of the said party of the first part (Van Rensselaer) the lands hereinafter mentioned, and to pay him for the same the sum of $3,296, in one year from the date thereof, with interest on the same till paid, otherwise these presents to be void both at law and in equity.' Van Rensselaer then covenanted that the money being paid, he would convey. To a declaration on this contract the defendant demurred, and judgment was rendered for the plaintiff."

In *Cartwright* v. *Gardner*, 5 Cush. 281, the court, in considering a clause in a contract of a similar character with the one in this cause, remarked: "It is often provided in leases, in strong unqualified terms, that if the lessee neglects or refuses to pay rent, the lease shall be void; but it always has been held, that the lessee cannot, in such cases, set up his own neglect as avoiding the lease. Though the terms are express and positive, that the lease shall be void, yet they are held to mean, that the lease shall be void only at the election of the lessor, for whose benefit the provision is made."

In the light of these cases, and we find none to the contrary, we feel constrained to hold that the meaning of the clause under discussion in the agreement in this case is that such agreement is void only at the election of the plaintiff, how can avoid it or enforce it at his option.

The judgment must therefore be reversed, and as in our view the plaintiff is entitled on the facts found to a judgment for the amount sued for, with interest at the rate of ten per cent per annum from the date of the contract, the case is remanded, with directions to the court below to enter judgment for the plaintiff accordingly.

SHARPSTEIN and MYRICK, JJ., concurred.

Hearing in bank denied. *Reversed and remanded.*

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

WOODS v. STATE.

(76 Ala. 35.)

Criminal law — evidence — corroborating accomplice — by wife.

Where an accomplice is allowed to testify, he may be sufficiently corroborated by his wife.

CONVICTION of larceny. The opinion states the point.

Thos. Seay, for appellants.

T. N. McClellan, attorney-general, for State.

SOMERVILLE, J. [Omitting other points.] The third charge requested by the defendants and refused by the court raises the question as to whether the testimony of the wife of an accomplice may be legally regarded as a corroboration of the testimony of the accomplice himself, within the meaning of section 4895 of the Code, which prohibits a conviction of felony on the uncorroborated testimony of an accomplice. It has been held in an English case, comparatively modern, that confirmation by the wife is "no confirmation at all," the wife and the accomplice being only taken as

one. *Rex* v. *Neal*, 7 C. & P. 168; 3 Russ. Cr. (9th ed.) 608. Mr. Phillips observes of this case, that its circumstances "might have been such as to warrant this decision." "But," he adds, "it may often happen, that the evidence of the wife is so free from suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient corroboration." 1 Phil. Ev. 33. The only ground upon which the rule declared in *Rex* v. *Neal* can be reasonably sustained would seem to be, that the interests of the husband and wife are so nearly identical, and the domination of the former over the latter so powerful and irresistible, that she must necessarily be warped in her testimony by the potency of these considerations, regardless of the sanctity of her oath. There is much force in this view, but it is based rather upon theoretical than practical reasons, and finds little or no support among the adjudged cases in this country. It is a corollary from the proposition of the ancient common law, holding to the abrogation of the wife's legal entity by a complete merger of it into that of her husband—a theory which has been modified by recent legislation, and the changed *status* of the wife, as wrought by the refining usage of a more cultured civilization. The wife under our laws may be the owner of her separate estate, in a more real sense than ever before. She may dispose of it by will, so as to cut off the claims of her husband, thus rendering her, to a great extent, financially independent of him. She may be declared a "free-dealer" by a court of chancery, so as to invest her with important powers over her own property, whenever her interests require it. She may procure the removal of her husband from the trusteeship of her property, when his conduct shows him to be unfit for its management. So, she may be divorced from her husband upon the grounds of his cruelty to or abandonment of her. Nor is the husband's power of corporal punishment over her now recognized, as it seems to have been in the early history of the common law. The American authorities generally support the view, that the testimony of the wife may be a satisfactory and sufficient corroboration of her husband, who testifies as an accomplice, within the discretion of the jury, so as to warrant a conviction, in cases where such corroboration is requisite. The fact of the relationship, and the danger of marital domination on the part of the husband, go

it is true, largely to assail the credibility of the wife, but not to her competency; and the degree of weight which should be accorded to her testimony must be left to the jury. It may sometimes constitute a very weak corroboration, yet it cannot justly be said to be absolutely no corroboration at all. The case bears no similitude to that of an accomplice, whose testimony, it has been held, cannot confirm that of another accomplice in the same crime. 1 Greenl. Ev., § 380; 3 Russ. Cr. 609; *Rex* v. *Noakes*, 5 Car. & P. 326. The reason is, that each is contaminated by the turpitude of the same guilt, and the same infirmity therefore attaches alike to the testimony of both. This view is taken generally by the American courts, where the question has been considered and decided. *Dill* v. *State*, 1 Tex. Ct. App. 278; *State* v. *Mone*, 28 Iowa, 128; *Haskins* v. *People*, 16 N. Y. 344; 1 Bish. Cr. Proc. (3d ed. 1880), § 1170.

We find no error in the rulings of the court, and the judgment must be affirmed.

Judgment affirmed.

HELMETAG'S ADMINISTRATOR v. MILLER.

(76 Ala. 188.)

Insurance — life — interest — assignment.

A policy of insurance, issued to one on his own life may not be assigned by him to another having no interest in his life, and an assignment as collateral is void beyond the amount of the debt.*

BILL for account of life insurance moneys. The opinion states the point. Bill dismissed below.

Hannis Taylor and *Henry St. Paul*, for appellant.

Overall & Bestor, contra.

SOMERVILLE, J. No principle of the law of life insurance is at this day better settled than the doctrine, that a policy taken out by one person upon the life of another, in which he has no insurable interest, is illegal and void, as repugnant to public policy. 3 Kent Com. (11th ed.) 462–63. Such contracts are aptly termed "wager

* See *Mut. Life Ins. Co.* v. *Allen, ante; Currier* v. *Cont. Life Ins. Co., ante.*

policies," and are entitled to no higher dignity, in the eye of the law, than gambling speculations, or idle bets as to the probable duration of human life. There is no limit to the insurable interest which a man may have in his own life; but there are forcible reasons why a mere stranger should not be permitted to speculate upon the life of one whose continued existence would bring to him no expectation of possible benefit or advantage. All wagers, at common law, were not illegal, but only such as were contrary to good morals or sound policy. Chitty Cont. 468. The statute of this State makes all contracts by way of gaming or wagering void. Code, 1876, § 2131; *Hawley* v. *Bibb*, 69 Ala. 52. However this may be, wager policies, or such as are procured by a person who has no interest in the subject of insurance, are undoubtedly most pernicious in their tendencies, because in the nature of premiums upon the clandestine taking of human life. As observed in *Ruse* v. *Mutual Benefit Ins. Co.*, 23 N. Y. 516, "such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against." It has been said by another court, in a comparatively recent case, that of "all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation." *Missouri Val. Life Ins. Co.* v. *Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 75.

What will constitute an insurable interest in the life of another, such as will rescue such contracts from the imputation of being regarded as wager policies, it is not easy to define by a general rule. It has been held, in some cases, that the interest must be, in some sense, a pecuniary one, not predicated merely upon the fact of existing relationship. *Guardian Mut. Life Ins. Co.* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180; *Missouri Val. Life Ins. Co.* v. *Sturges*, *supra*. In other cases, a contrary view has been intimated, which does not however seem to be sustained by the weight of authority. *Warnock* v. *Davis*, 104 U. S. 775; *Continental Life Ins. Co.* v. *Volger*, 89 Ind. 572; s. c., 46 Am. Rep. 185; May Ins., § 107; *Lord* v. *Dall*, 12 Mass. 115; s. c., 7 Am. Dec. 38, and note, p. 42.

This contrariety of view however is of no importance here, as it is not denied that the appellee, Miller, had an insurable interest in the life of Helmetag, the decedent, to the extent of the value which he paid for the policy claimed to have been purchased by

him. The bill recognizes this interest, and offers to refund to him this amount, estimated at about $750, with lawful interest. The point of contention is, that admitting the assignment of the policy to Miller to be an absolute purchase, and not a collateral security, it was nevertheless void in his hands for *the excess* over and above the amount which he paid for it. It is urged, in reply, that a policy taken out by a party on his own life, and thus valid in its inception, cannot become a wager policy by the mere fact of its assignment. It is true that there are cases which sustain this view, but they do not, in our opinion, either accord with sound reason, or harmonize with the weight of authority. The reason of the law which vitiates wager policies is the pecuniary interest which the holder has in procuring the death of the subject of insurance, thus opening a wide door by which a constant temptation is created to commit for profit the most atrocious of crimes. This reason applies, with exactly the same force, to holding a policy by purchase, or assignment, as to holding one originally by direct issue from the insurance company. Otherwise the law would permit that to be done by indirection, which it prohibits from being done directly, and the end sought to be accomplished could practically be evaded with both facility and impunity. The evil of wager policies would rather be aggravated than otherwise by such a rule, because speculators, desiring to indulge this species of gambling in human life, could more easily purchase from embarrassed policyholders than procure the issue of such policies directly to themselves upon the lives of strangers. "In either case," as observed by a recent author in treating of this subject, "the holder of such policy is interested in the death, rather than the life of the insured." May Ins., § 398. This view is fully supported by the authorities, which being directly in point, we cite without any attempt to discuss them. *Missouri Val. Life Ins. Co* v. *Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 761; *Franklin Fire Ins. Co.* v. *Hazard*, 41 Ind. 116; s. c., 13 Am. Rep. 313; *Stevens* v. *Warren*, 101 Mass. 564; *Warnock* v. *Davis*, 104 U. S. 775; May Ins., § 398.

A policy which is purchased for any specific sum can be considered a wager policy, under these principles, only for the excess of the amount realized on it by the purchaser over and above the purchase-money, with interest. To this extent, the holder has an insurable interest, and thus far a court of equity will protect him.

So far as concerns the surplus, the policy is just as much a contract of wager as if it covered only this particular excess. In *Warnock* v. *Davis*, 104 U. S. 775, this principle was decided, Mr. Justice FIELD observing, that "to the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy." The assignment, he said, was "only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sustain speculative risks in human life, and encourage the evils for which wager policies are condemned." The same rule had been previously announced in *Cammack* v. *Lewis*, 15 Wall. 643. It is also fully indorsed by the Supreme Court of Illinois in the case of *Guardian Mut. Life Ins. Co.* v. *Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180.

It is immaterial, in this aspect of the law, whether the policy of insurance on the life of Helmetag was assigned to Miller as collateral security for the amount admitted to be due, or whether it was assigned by absolute sale. The result is exactly the same in either case. Equity will regard it, in legal effect, as collateral security in the one case, as well as in the other. The facts stated in the bill entitled the complainant to relief under the general prayer; and these facts are fully sustained by the proof.

The chancellor erred in dismissing the bill; and his decree is reversed, and the cause remanded.

Reversed and remanded.

FELRATH v. SCHONFIELD.

(76 Ala. 199)

Insurance — life — for wife — payment by husband.

Under the statute allowing wives to insure their husband's lives for their exclusive benefit, a policy is valid although taken out and kept up by the husband without the wife's knowledge.

BILL by creditors to reach insurance moneys. The opinion states the point. The bill was dismissed below.

J. L. & G. L. Smith, for appellant.

R. H. Clarke and *Overall & Bestor*, contra.

SOMERVILLE, J. The bill is filed by the appellant, Felrath, as a creditor of one Vogel, to reach the proceeds of certain policies of insurance taken out by him on his own life and payable to his wife as beneficiary. The theory of the suit is, that the investment by the deceased husband was a fraud on the appellant and other creditors.

The main inquiry upon which the case depends is, as to whether these policies can be properly construed to come within the influence of section 2733 of the present Code. This section declares, that "any married woman, by herself and in her name, or in the name of any third person with his assent as her trustee, may cause to be insured for her sole use, the life of her husband;" and that the proceeds of the policy or policies shall be payable to her if she survives him, to her own use, free from the claims of creditors of the husband. The amount of premiums allowed to be invested in this manner however, from the moneys of the husband, is not permitted to exceed the sum of $500 annually.

The facts as admitted show that the policies were obtained at the instance of the husband, and that the wife had no agency in procuring them; and it is insisted that for this reason, they do not come within the statute. This construction of the statute is, in our opinion, entirely too narrow and rigid. The policy of such legislation finds its origin in the duty of maintenance and protection which every husband owes to his family, and the importance to the State that as few widows and orphans as possible should be cast as paupers upon the public charity. *Continental Life Ins. Co.* v. *Webb*, 54 Ala. 688; *Stone* v. *Knickerbocker Life Ins. Co.*, 52 Ala. 589. In *Fearn* v. *Ward*, 65 Ala. 33, we said, that this statute was "in the nature of a law exempting property from liability to execution." It has been uniformly held in this State, that exemption laws are to be liberally construed; and the application of this principle forbids the strict construction contended for by the counsel of the appellant. A similar statute prevails in the States of Illinois and Missouri, each, like our own, being copied substantially from the New York statute of 1840. So far as affects the question before us, the phraseology of these various laws seems to be essentially the same. The courts of these States have held, that the statute is remedial

in its character; that it is founded on charity, and intended to subserve a beneficent purpose, and that it is in the nature of, though not strictly an exemption law; and for these several reasons that it should be liberally construed to effect the legislative policy contemplated in its passage. *Cole* v. *Marple*, 98 Ill. 58; s. c., 38 Am. Rep. 83; *Charter Oak Life Ins. Co.* v. *Brant*, 47 Mo. 419; s. c., 4 Am. Rep. 328; *Brummer* v. *Cohn*, 86 N. Y. 11; s. c., 40 Am. Rep. 503.

We do not think it was ever contemplated that a policy of insurance should have been taken out by the wife exclusively, or through her agency, in order to receive the protection of the statute. Under the rules of the common law the wife was disabled to make, or cause to be made, a contract of this nature; and even to any contract made by a third person, for the benefit of the wife, the assent of the husband was required. 1 Pars. Cont. (6th ed.) 369. The statute must be construed therefore to be enabling in its purposes, designed to remove from the wife the shackles of coverture imposed by the common law, which served to paralyze her independent authority to contract — so far at least as this particular subject-matter is concerned. When the husband undertakes to procure for her a policy of insurance on his own life in accordance with its provisions, he acts for her as her self-constituted agent; and inasmuch as he is conferring a benefit upon her in the nature of a gift, her acceptance of it will be presumed, especially in view of her subsequent assertion of claim to it. The creditors of the husband are no more injured where the husband acts for the wife than where the wife acts for herself. The injury, if any, lies in the appropriation of the husband's money to the use of the family. It would be a narrow view of the law to say that it authorizes the husband to hand over money for premiums to the wife, and that she could lawfully take out the policy, but that if he should take the same money and procure the issue of the policy for her use and in her name, it would be vitiated by reason of her ignorance of, or want of agency in the negotiation. There can be no more fraud against creditors in the one case than in the other.

The policies, in our judgment, are within the equity and spirit of the statute, if not strictly within its letter, and were issued in substantial compliance with the provisions of the statute. Beneficial statutes, especially when enabling or remedial in their nature, have always been expounded by what is called an equitable con-

struction, so as to be either enlarged or restrained in their letter *ultra* the strict letter, but not, as well said, *contra* the letter. Potter Dwar. Stat. 236, 237.

In construing this statute in *Fearn* v. *Ward, supra,* it was not necessary for the purposes of that case that we should go to this extent.

Unless the husband is shown to have invested more than the sum of $500 annually in premiums on the policies, no part of the proceeds could be reached by creditors. *Fearn* v. *Ward,* 65 Ala. 33; Code 1876, § 2733. This fact the bill fails to allege, and the chancellor erred in not sustaining the demurrer based on this ground. The cause must be reversed for this reason, and remanded on the cross-appeal taken by Caroline Schonfield and others. The decree dismissing the bill for want of equity however as to the several defendant insurance companies on the main appeal taken by the complainant, Felrath, is without error.

Reversed and remanded.

O'Donnell v. Rodiger.

(76 Ala. 282.)

Will — insanity — presumptions.

The testator is presumed to have been sane, but when habitual and fixed insanity prior to the making of the will is shown, the burden of proof is then shifted.*

CONTESTED probate of will. The opinion states the point.

H. . Smith and *J. L. & G. L. Smith,* for appellant.

L. H. Faith and *Cloud & Cloud,* contra.

CLOPTON, J. [Omitting minor points.] Sanity is the normal condition of the human mind, and therefore the presumption is, whether a presumption of law, or of fact, or of mixed law and fact, that every person, of full age, has sufficient mental capacity to make

* See *Kingsbury* v. *Whitaker* (32 La. Ann. 1058), 36 Am. Rep. 278.

a will. This competency is presumed to continue, until the contrary is shown. When a will is propounded for probate, no general duty devolves on the proponent to make proof, in the first instance, of the sanity of the testator at the time of making the will. Whatever may be the conflict in the decisions of different courts, it may be regarded as too well settled in this State, to be controverted or doubted, that when a will is contested on the ground of mental incapacity, the *onus* of proof is on the contestant. The time to which the inquiry must be directed is the particular period when the will is made; but for this purpose the mental condition of the testator, before and subsequently, may be shown.

The contestant fulfills this requirement as to the *onus* of proof, when he establishes lunacy at a time prior to the making of the will. As the presumption is that lunacy, once established, continues, if it is alleged, in such case, that the will was made during a lucid interval, "the burden of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period." *Saxon* v. *Whitaker*, 30 Ala. 237; *Jackson* v. *Dusen*, 2 Johns. 144; *Grubbs* v. *McDonald*, 91 Penn. St. 236.

In order however to have effect to shift the burden of proof on the proponent, to show that the will was made during a lucid interval, the contestant must establish habitual and fixed insanity. Occasional fits, or aberrations of mind produced by temporary causes, are not sufficient. There is no presumption in favor of the continuance of any thing temporary, or ephemeral in its nature. The disease of the mind must be of such general and permanent character, as human experience shows generally continues. Where the insanity is produced by an attack of some acute or violent disease, it is not sufficient for the contestant merely to show its existence, under such circumstances, at a time, short or distant, preceding the making of the will. He must also show its continuance to the time when the will is made. *Brown* v. *Riggin*, 94 Ill. 560; *Clarke* v. *Sawyer*, 3 Sandf. Ch. 351; *Hix* v. *Whittemore*, 4 Metc. 545.

In *Saxon* v. *Whitaker*, *supra*, it is said: "As a lucid interval is temporary in its nature, and uncertain in its duration, the law will not presume its continuance for a month, a day, or an hour;" this is when usual or habitual insanity has been once established. The converse of the proposition is equally true; the continuance of a temporary delusion or delirium caused by disease will not be presumed "for a month, a day, or an hour." In *Staples* v. *Welling-*

Lum, 58 Me. 453, it is said: "If the delusion or delirium is that caused by disease, it is obviously temporary in its character. It will continue only during the continuance of the fever, in which it originated. If a fever is shown to exist at a given date, the law does not presume its continuance, as in the case of fixed insanity. So there is no presumption of law as to the continuance of the temporary hallucination or delusion resulting from disease. The party claiming to avoid a contract, by reason of temporary hallucination or delusion, must show its existence at the time of the contract sought to be avoided for such cause, and that it was of a character affecting his capacity to make the contract sought to be avoided."

The second charge requested by the proponent put the *onus* of proof, in the first instance, on the contestant, and in this respect, is in accord with the principles we have stated. The predicate of the charge requested by the contestant does not answer the rule. That on the day the will was signed, the testatrix "was sick and flighty; that during part of the time she knew what she was doing, and part of the time she did not know what she was doing," is not sufficient to cast on proponent the burden to show that she was sane at the particular time when the will was made. The hypothesis stated is not a condition of fixed or habitual mental derangement or flightiness. The clear implication from the hypothetical facts is, that the flightiness or delirium was temporary, and subsided and ceased, as the operating cause subsided and ceased.

"A total deprivation of reason is not requisite to destroy testamentary capacity. Dementia and idiocy are not the only forms of incapacity. A competent testator must not only have mind and memory, but mind and memory enough to understand the business in which he is engaged." A disposing memory is requisite — not mere weakness of understanding, but "power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relation to each other." The testatrix should have had capacity to know what she was doing. *Stubbs* v. *Houston*, 33 Ala. 555; *Taylor* v. *Kelly*, 31 Ala. 59; *Converse* v. *Converse*, 21 Vt. 168. This is the test of testamentary capacity applicable to this and similar cases.

Judgment affirmed.

WHITE v. EQUITABLE NUPTIAL BENEFIT UNION.

(76 Ala. 251.)

Marriage — contract of marriage insurance — when void.

Under the charter of the defendant, a private corporation, organized "to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed $6,000, to be paid at marriage or endowment, according to the regulations adopted;" a certificate of membership providing, "that no member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate," and that "every member who shall have been in good standing, for at least three months prior to his marriage, shall be entitled to $40 per month upon each $1,000 named in his certificate, for each whole month of his membership, provided that the same shall never exceed $8,000, or so much thereof as shall be realized from one marriage assessment of all the members of this class," and procured for the benefit of a third person, not related to the member, but who was to pay the dues and assessments, and to receive two-thirds of the proceeds when collected, is void as in restraint of marriage, and as a wager policy of insurance.

CONTRACT. The opinion states the case. The defendant had judgment below.

Humes, Gordon & Sheffey, for appellant.

Walker & Walker, *Jno. D. Brandon* and *L. Cooper*, contra.

CLOPTON, J. The special counts of the complaint declare on a contract, called a "marriage insurance policy," issued by the "Equitable Nuptial Benefit Union," which is averred to be a corporation, duly incorporated under the laws of this State. The question of the validity of the contract was made by demurrer to the special counts; the causes assigned being, that it is in the nature of a marriage-brokage contract, is in restraint of marriage, and is in the nature of a gambling contract.

A marriage-brokage contract is an agreement for the payment of money or other compensation for the procurement of a marriage. Although they may not be a fraud on either party, such contracts are held to be void and a public mischief, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children,

and to tempt the exercise of an undue and pernicious influence for selfish gain in respect to the most sacred of human relations. An essential element in such contract is the procurement of a marriage, oftentimes without regard to the wishes of friends or parents, or to the happiness of the parties most deeply interested. There is no such element in the contract sued on; nor is there any thing in its nature that contemplates compensation for the negotiation or procurement of any particular marriage. By the contract it is agreed to pay an amount of money upon the contingency of marriage, but leaves the party in the exercise of entire freedom as to the person with whom he may propose to contract marriage. While in view of the conclusions at which we have arrived, it is unnecessary to decide this question, we have said thus much, it being presented by the record to exclude any inference that in our opinion the contract is obnoxious to this objection.

Without extending this opinion by an unnecessary attempt to consider the different and varied applications of the rules determining the illegality of contracts, and of conditions annexed to gifts or testamentary dispositions in restraint of marriage, we shall refer to those rules that have been generally accepted and recognized. Subject to modifications and limitations by the application of other special rules, dependent upon the facts, whether the condition be precedent or subsequent, or whether there is a gift over, or whether the property be real and personal, all conditions in deeds or wills, and all contracts executory or executed, that create a general prohibition of marriage, are contrary to public policy, and to "the common weal and good order of society." The rule rests upon the proposition, that the institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue; and that to secure well-assorted marriages, there must exist the utmost freedom of choice. Neither is it necessary there shall be positive prohibition. If the condition is of such nature and rigidity in its requirement as to operate as a probable prohibition, it is void.

On the other hand, conditions in conveyances or annexed to legacies and devises, in partial restraint of marriage, in respect to time, or place or person, if reasonable in themselves, and not materially and practically creating an undue restraint upon the freedom of choice, are not void. Says Judge Story: "But the same principles of public policy which annul such conditions, when they

tend to a general restraint of marriage, will confirm and support them, when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences, to which an over-hasty, rash or precipitate match would probably lead." 1 Story Eq. Jur., § 281.

The want of harmony in the adjudged cases does not arise from any ambiguity in the rule itself, but from its comprehensive terms, inasmuch as the application of the rule to each particular case is submitted to the sound discretion and judgment of the court. The courts apply it according to their estimation of the relative necessity and importance of preserving the largest liberty in the formation of marital alliances on the one hand, and on the other, of upholding the prerogative of the dispenser of bounty to dictate the terms upon which its enjoyment shall commence or continue, and of the right of persons competent to contract to fix the terms of their agreement so far as may be consistent with the public weal. 2 Lead. Cas. in Eq. 420; *Maddox* v. *Maddox*, 11 Gratt. 804; *Morley* v. *Rennoldson*, 2 Hare, 571; *Williams* v. *Williams*, 13 Mo. 211; 2 Com. Eq. Jur., § 933; *Coppage* v. *Alexander*, 2 B. Monr. 313; s. c., 38 Am. Dec. 156 (note). Under the operation of this rule, conditions restraining marriage, without consent of parents, guardians or executors, or under twenty-one, or other reasonable age, or with particular persons, are held to be valid; and conditions not to marry a man of a particular profession, or that lives in a named town or country, or who is not seised of an estate in fee, are held to be general and void. *Collier* v. *Slaughter*, 20 Ala. 263; *Stackpole* v. *Beaumont*, 3 Ves. 88; *Younge* v. *Furse*, 8 De G., M. & G. 756; *Scott* v. *Tyler*, 2 Bro. C. C. 488.

It is true, these instances of the application of the rule are in cases of conditions annexed to gifts, devises or legacies; but illustrate that the condition will be sustained, when it is the exercise of due and reasonable precaution against rash and imprudent marriages. But if it is an evasion of the law, or a cover to restrain marriage generally, or is *in terrorem*, the condition will be declared void. The present is the case of a contract, and these illustrations are helpful only to the extent that contracts in restraint of marriage are dependent upon the same principles.

The charter of the "Equitable Nuptial Benefit Union" declares, "the object of the association is to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed

$6,000, to be paid at marriage or endowment, according to the regulations adopted." It is proposed to accomplish this ostensibly laudable object by the issuance of certificates of membership. The one issued in this case contains, among others, the following provisions: "No member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate. Every member who shall have been in good standing as a member for at least three months prior to his marriage shall be entitled to $40 per month upon each $1,000 named in his certificate, for each whole month of his membership; provided that the sum shall never exceed $3,000, or so much thereof as shall be realized from one marriage assessment of all the members of this class."

The restraint of marriage is partial. The counsel for plaintiff insists that the restraint is reasonable, not forbidding marriage, but postponing it, with the consent of the applicant for membership, to a period when it can presumably be made to greater advantage; and therefore should be held valid, by analogy to similar provisions in gifts or testamentary dispositions. No circumstances are proved, to show the reasonableness of the restraint. This must be ascertained from the certificate of membership, without the aid of extrinsic and surrounding facts and circumstances. Looking at the certificate we are forced to the conclusion, that the restraint of marriage for three months is not for the benefit or advantage of the applicant, but to enable the association to realize a benefit fund, and to keep the applicant in a condition to contribute thereto, by the payment of dues and assessments.

In *Hartley* v. *Rice*, 10 East, 22, Lord ELLENBOROUGH, C. J., says: "On the face of the contract, its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said however that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to show that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient of the contract." And in *Sterling* v. *Sinnickson*, 2 South. 756, where the action was on a sealed bill to pay $1,000, provided the obligee was not lawfully married in six months, KIRKPATRICK, C. J., after stating the general principle, that all obligations to restrain marriage generally are void, says: "And I

find no case, but in that of legacies (with one exception of a gift), that gives validity to an instrument, when made in contradiction to the principle first mentioned. And the principle of time, place and person, appears to apply to legacies only, unless for a good consideration."

It is not stated that there existed any relation between the applicant and the plaintiff, or the association, that would or could have moved either the plaintiff or the association to impose the restraint from prudential motives in favor of the applicant. A person having an interest, arising from relationship or close friendship, may, by conditions of partial restraint in gifts or legacies, guard and protect inexperienced youth against rash and improvident marriages; and the husband may restrain his widow, in the interests of his children; but as is added in some of the cases, "this could not be done by a stranger."

In *Chalfant* v. *Payton*, 91 Ind. 202; s. c., 46 Am. Rep. 586, a certificate of membership issued by the "Immediate Marriage Benefit Association," was held to be contrary to public policy, and illegal —the contract being to pay a sum of money, on condition that the member does not marry within two years, and on marriage thereafter to pay a certain sum per day during the time he shall remain unmarried. It may be said, that the time of restraint by the contract sued on is for a much shorter period. By what rule, in the absence of special facts and circumstances, can the reasonableness of the time of restraint be measured? By what scales can the degree of its effect upon the mind of the applicant be weighed? When a parent restrains the marriage of a child, or a friend prohibits it, without the consent of parents or guardian, until an age at which the child is competent to contract without such consent, the restraint does not violate, but is in furtherance of the policy of the law. But when a stranger, without any interest or motive, except for selfish gain, enters into a contract, restraining the marriage of another for a definite period of time, the contract, *pro tanto*, violates public policy.

If there were no provision, other than the restraint for three months, a doubt as to its illegality might reasonably be entertained; but the restraint for three months is not the full scope of the contract. To obtain a clear comprehension of its nature and tendency, another provision must be observed. The certificate not only makes the payment of the money conditioned on not marrying in less than

three months, but provides that upon marriage after the expiration of three months, the member shall be entitled to receive $40, on each $1,000 named in the certificate, for each whole month of his membership; that is during the time he remains single. Thus the contract contains an inducement to postpone marriage indefinitely, although the member contemplates its consummation at some future uncertain time; for the longer the marriage is postponed, the larger is the sum to be paid. The amount which the member will be entitled to receive is conditioned on the length of time marriage is deferred. This inducement, in connection with the restraint for three months, may have the effect to operate an indefinite postponement; and as there is no limit within which the member shall marry, it may operate to occasion a general restraint.

Insurance, being an indemnity against loss or risk, is not intended for the benefit of persons having no concern in the subject-matter, nor any interest in the event. In *Helmetag* v. *Miller*,* at the present term, it is said: "No principle of the law of life insurance is, at this day, better settled than the doctrine that a policy taken out by one person upon the life of another in which he has no insurable interest, is illegal and void, as repugnant to public policy. * * * Such contracts are aptly termed 'wager policies,' and are entitled to no higher dignity in the eye of the law than gambling speculations or idle bets on the probable duration of human life." The same principle, that where there is no insurable interest the policy is invalid, pervades the law of all kinds of insurance. At an early period marine insurance policies without interest were considered innocent wagers; but now such policies are held to be void, as contravening the cardinal object of insurance — indemnity against loss — and as being dangerous and demoralizing by tempting the insured, having nothing to lose but everything to gain, to bring to pass the event upon the happening of which the insurance becomes payable. May Ins., § 75. Although the certificate is not properly a policy of insurance, an application of these principles will enable us to arrive at a satisfactory conclusion as to the character of the contract when considered in the light of the attendant circumstances.

Vanderventer, at the time of making the application, in response to questions propounded, named the plaintiff as the person to

* *Ante*, *p.* 316.

whom the benefit should be paid, and to whom notices of dues and assessments should be sent for payment. There was also an agreement that plaintiff would pay all dues and assessments, which he did, and Vanderventer should receive one-third of the proceeds of the certificate when collected, after deducting expenses. It is manifest that while Vanderventer made the application personally and is the nominal member, he was the mere instrument to procure the certificate, and that the contract was made really for the benefit of the plaintiff. It must be regarded as virtually and substantially a contract with him.

The plaintiff, not being related to Vanderventer by affinity or consanguinity, and having no business relations with him whatever, had no personal interest in his marital relations. It was speculation on the part of the plaintiff, without interest, upon the probability of Vanderventer's marriage — as the plaintiff tersely characterized it in his testimony, "a speculation in marriage futures." Such contract is disfavored and disapproved by the law in the interests of the common weal, of good order and general public policy. It subjects the plaintiff to a temptation, for pecuniary advantages, to promote and procure the marriage of Vanderventer at some future period, by which the plaintiff has nothing to lose. Upon analogous principles in cases of insurance such contract is in its nature a wager contract. *Chalfant* v. *Payton, supra.*

[Minor point omitted.]

The court will not lend its aid to either party for the enforcement of an illegal executory contract in an action to recover for its non-execution; and when a contract, contravening good morals or public policy, has been fully and voluntarily executed, and the parties are *in pari delicto*, the court will not interfere with the acquired rights of either at the instance of the other. *Hill* v. *Freeman*, 73 Ala. 200. The claim of the plaintiff to recover the dues and assessments paid falls within this rule.

Judgment affirmed.

BURNS v. MOORE.

(76 Ala. 339.)

Sunday — contract — "necessity."

The note in suit was executed on Sunday to the plaintiff, who was travelling, and wished to pursue his journey on that day. He had been at the place of its execution for two days, and no reason was shown for its not having been executed before. *Held*, not a "case of necessity" which would render the contract valid.

ACTION on a note. The head note states the case. The defendant had judgment below.

Jno. D. Brandon, for appellants.

L. Cooper, contra.

SOMERVILLE, J. [Minor points omitted.] The main question raised by the rulings of the court is, whether the note is void as to the defendant McGee, as a contract executed in violation of the Sunday law. The statute declares that "all contracts made on Sunday, unless for the advancement of religion, or in the execution, or for the performance of some work of charity, or in case of necessity, are void." Code, 1876, § 2138.

The note bears date on Saturday; but this was only *prima facie* evidence of the true date of execution, which could be shown by parol proof. *Aldridge* v. *Br. Bank at Decatur*, 17 Ala. 45.

So it is clearly immaterial whether the note was signed on Saturday and delivered on Sunday, or was both signed and delivered on the latter day. The mere writing and signing a note on Sunday, unless it be then delivered, will not avoid it. *Flanagan* v. *Meyer*, 41 Ala. 132; *Love* v. *Wells*, 25 Ind. 503. The date of the making of such a contract, within the meaning of the statute, is therefore necessarily the day of its delivery, for the reason that it can have no efficacy or binding force until the act of delivery is performed. *King* v. *Fleming*, 72 Ill. 21; s. c., 22 Am. Rep. 131; *Butler* v. *Lee*, 11 Ala. 885; *Clough* v. *Davis*, 9 N. H. 500; 2 Pars. Cont. 763.

The rulings of the court are in strict harmony with these views. It will be observed that all contracts, of whatever nature, are

rendered void by the statute, if made on Sunday, unless they fall within one of the classes of cases specially excepted. The law is therefore more sweeping in its vitiating effects than the former statute in this State, known as the act of 1803, or the English statute of 29 Charles II, being on the same subject-matter. *Saltmarsh* v. *Tuthill*, 13 Ala. 390.

It is insisted that the evidence tended to show, that the making of the note in controversy was a case of necessity, and that the court should have submitted this issue to the jury, as making a case within one of the exceptions of the statute. If there was any evidence introduced on the trial, from which such an inference could be drawn, the question of the sufficiency of this evidence should have undoubtedly been left to the jury for their determination. *Hooper* v. *Edwards*, 18 Ala. 280; *Feital* v. *Middlesex Railroad*, 109 Mass. 398. But the facts of the case tended to establish no such conclusion. The term necessity, as used in such statutes, means more than physical necessity. It is universally construed by the court to involve also considerations of moral fitness and propriety under the peculiar circumstances of the particular case. The design of the law is to preserve, to some extent, the sanctity of the Christian Sabbath, by discouraging indulgence in certain kinds of business of a secular nature. *Smith* v. *Boston R.*, 120 Mass. 490; s. c., 21 Am. Rep. 538; *Johnson* v. *People*, 31 Ill. 469; Code, 1876, §§ 4443–44. The necessity which will excuse, if not a physical one, must, at least, be a moral emergency which will not reasonably admit of delay, but is so pressing in its nature as to rescue the act done from the imputation of a willful desecration of a day made sacred for certain purposes in morals as well as in law. To this class belongs, as it has been held by this court, a contract by which a creditor secures an indemnity from an absconding debtor, who was pursued and overtaken on Sunday. *Hooper* v. *Edwards*, 18 Ala. 280. And an undertaking of bail which is entered into on Sunday. *Hammons* v. *State*, 59 Ala. 164. Such, too, it has been said, is the act of repairing a defect in a public highway which constantly endangered the safety of travellers. *Flagg* v. *Inhabitants of Millbury*, 4 Cush. 243. And the loading of a vessel where there is danger of navigation being closed. *McGatrick* v. *Wason*, 4 Ohio St. 566. Not so however it has been said, with the execution of a promissory note on Sunday, made to procure the discharge of the principal maker, who had been arrested on a charge

of bastardy. *Shippy* v. *Eastwood*, 9 Ala. 198. Or the clearing out of a wheel-pit on the Sabbath, for the purpose of preventing the stoppage, on a week day, of mills which employed a large number of hands. *McGrath* v. *Mervin*, 112 Mass. 467; s. c., 17 Am. Rep. 117.

We see in this case no elements of either physical or moral necessity. No emergency is shown which excuses the taking of the note on Sunday. The plaintiff, Burns, who took the note from McGee, is shown to have arrived at Huntsville on Friday, and remained there until Sunday afternoon. No excuse is shown for delaying the act until a short time before his departure which bears the appearance of a moral exigency. No excuse is shown for not postponing the act another day, except the mere inconvenience of an ordinary delay in travelling. The court properly charged the jury, that the case did not present one of "necessity" within the contemplation of the statute.

Judgment affirmed.

Central Railroad and Banking Company v. Lampley.

(76 Ala. 357.)

Carrier — of letters — liability.

A common carrier, who is also a contractor with the government for carrying the mails, is not liable as a common carrier to the sender of a letter by mail for its loss.

ACTION for conversion of a letter. The opinion states the case. The plaintiff had judgment below.

Roquemore & Shorter, for appellant.

McKleroy & Comer, contra.

CLOPTON, J. A common carrier, as generally defined, is one whose usual or regular business is the transportation, for reward, of goods from one place to another, for such persons as choose to employ him. To originate the exceptional liability of the common law, although founded on reasons of public policy, and to create the relation, there must exist privity of contract, express or implied, and a title to compensation for the services. Public policy operates

on those only who transport for reward or hire. Where there is no right to remuneration, the party who carries incurs no liability other than that of a gratuitous bailee. *Cit. Bank* v. *Nan. St. Co.*, 2 Story, 16; *Knox* v. *Rives*, 14 Ala. 249.

Between a contractor for carrying the public mails, and the sender of letters, there is no privity of contract, and the contractor has no right to, and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail-contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire.

The railroad company was not transformed into a common carrier as to the mails, because, being engaged in the regular business of transporting goods for the public, it was, at the same time, carrying the mails, by direction and employment of the proper department of the government. The occupation of the company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot therefore be determined by the rules governing the responsibility of a common carrier.

It is well settled that public officers are exempt from liability for the acts and defaults of those employed under them to assist in the performance of their official duties. Notwithstanding the vigorous dissenting opinion of Lord HOLT, since the decision in *Lane* v. *Cotton*, 1 Ld. Raym. 646, it has been generally held that neither the postmaster-general, nor an assistant or local postmaster is responsible for the negligence or willful wrongs of the persons employed in assisting him in the discharge of his public duties and functions. The rule rests on considerations of public policy, and on the ground that such persons are acting in the capacity of public agents, and not as the private agents of the officers. It is conceded that a public officer is liable for his own misconduct or negligence, and for the misconduct or negligence of his subordinates, where he is invested with their selection or appointment, and from

carelessness or unfaithfulness appoints incompetent or untrustworthy persons. *Wiggins* v. *Hathaway*, 6 Barb. 632. As founded on like reasons and considerations, the exemption has, by some of the cases, been extended to mail contractors. *Connell* v. *Voorhees*, 13 Ohio, 523; *Hutchins* v. *Brackett*, 22 N. H. 252; *Foster* v. *Metts*, 55 Miss. 77; s. c., 30 Am. Rep. 504.

The idea of agency imports a delegation of power by one authorized to confer it. The relation exists between the appointee and the person who nominates or appoints, either directly or by redelegation or ratification — a person to whom the agent is responsible for the manner in which he executes the authority. The responsibility of a public officer for the acts and defaults of those employed by or under him, depends upon the question whether such persons are acting in the public service as agents of the Government, by direct appointment, or by authorized sub-appointment, or whether they are his private agents and servants, employed by virtue of his individual and independent authority, and paid by, and responsible to him, whom he can employ, retain and dismiss at will; "in other words, whether the situation of an inferior is a public office or private service." 1 Am. Lead. Cas. 785. If the subordinates are the agents and servants of the officers, not by an official employment, but to assist him as an individual in the discharge of his official service, the reason ceases for the non-application of the doctrine of *respondeat superior*, and for exemption from liability for their misconduct or negligence.

The contractor, being the person who contracts with and is paid by the Government, and who gives a guaranty for the faithful discharge of the service, is the public agent, if such contract constitutes an agency. He is the one directly responsible to, and with whom the Government deals. He employs his own carriers, who are paid by him, and who are not known to the Government other than as his employees. As to civil responsibility, the contractor stands between the carrier and the Government; although for the purpose of public security, an oath may be required of the carrier and penalties imposed for violations of the laws of the postal service. In a sense, the carrier may be said to do work for the Government, not as an agent, but as one employed by the contractor, in his own name, for his individual benefit and on his personal responsibility, as necessary help to do the service which he has contracted to do. Laborers employed by a contractor for the construc-

tion of naval vessels, or for the erection of public buildings, may in the same sense be said to do work for the government, but they are not public laborers. We approve and adopt the legal propositions as to the liability of a contractor, maintained and asserted in *Sawyers* v. *Corse*, 17 Grat. 230.

The mail-pouches were carried on the baggage in the baggage-car, to which persons employed on the train had access, and neither the conductor nor any one else had been sworn as a mail-carrier. It was held in *Bishop* v. *Williamson*, 2 Fairf. 295, that the postmaster was liable for the acts of one whom he permitted, without having been sworn, to have the care and custody of the mail in his office. Such person was said to be acting as the agent or servant of the postmaster.

The regular and usual business of the defendant was a carrier of passengers and goods. Its railroad was, by law, an established post-road, and by direction of the post-office department, was carrying the mails between Eufaula and Clayton. The agents and servants on the train were not employed for the special business of transporting the mails. They were employed in the general business of transportation, and under such employment, were used in the incidental service of carrying the mail matter. Being thus generally engaged, and rendering such general service as the private agents and servants of the defendant, the incidental service in carrying the mails does not impart to them the character of public agents and servants. If the money of the plaintiff, inclosed in a registered letter, was lost by the negligence or want of care of the agents or servants of the defendant, the defendant would be liable in a proper form of action.

We have said the defendant is not a common carrier in the transportation of mails, and does not incur the extraordinary liability imposed by the common law on carriers; that the liability of the defendant is that of a bailee for hire. A bailee for hire is not responsible for the willful wrongs of his agent, unless done in the course of his employment. If the money of the plaintiff was stolen, and the negligence of the defendant did not cause the theft, the defendant is not liable. The law "raises no presumption either way from the mere fact of theft. It neither imputes the theft to the neglect of the party, nor on the other hand exempts him from responsibility from that fact alone. But it decides upon all the circumstances of the case, and thence arrives at the conclusion, that there

has been or there has not been a due degree of care used." Story Bailm., § 39; *Foster* v. *Essex Bank*, 17 Mass. 479; *Moore* v. *Mayor*, 1 Stew. 284. The burden is on the plaintiff, to show that the theft was occassioned by the negligence of the defendant.

Whether the extent of the liability of the defendant be the exceptional liability of a common carrier, or the analogous liability of a bailee for hire, it must be enforced on proper pleadings and in a proper form of action. "A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev., § 642; *Conner* v. *Allen*, 33 Ala. 515. Where the circumstances do not amount to an actual conversion, a demand and refusal must be shown. A refusal to deliver on demand is evidence of a conversion, and not a conversion itself; and the demand and refusal must occur prior to the commencement of the suit, as the plaintiff's cause of action must be complete at that time. 2 Greenl. Ev., § 644; *Parker* v. *Middlebrooks*, 24 Conn. 207. Trover will lie only where the defendant is guilty of a conversion, which implies a wrongful disposition, appropriation, wasting, destruction or withholding of the property. The essential element of a conversion is malfeasance. The action will lie against a common carrier for a misdelivery, or an appropriation of the property to his own use, or for any act of dominion or ownership, antagonistic to and inconsistent with the plaintiff's claim or right. But trover will not lie against a carrier, for goods lost by accident or stolen, or for non-delivery, unless there be a refusal to deliver while having possession; nor for any act or omission which amounts to negligence merely and not to an actual wrong. *Packard* v. *Getman*, 4 Wend. 613; *Magnin* v. *Dinsmore*, 70 N. Y. 410; s. c., 26 Am. Rep. 608. So also a bailee is not liable for a conversion, who deals negligently with goods intrusted to him. *Heald* v. *Carey*, 11 C. B. 977. On like principles, trover will not lie against a mail contractor for money lost by negligence or stolen, unless the theft was authorized by him.

We do not understand, as is insisted on, that the evidence shows or tends to show, that the defendant is guilty of any wrongful disposition or appropriation or withholding of the letter containing the money, other than a failure to deliver on the commencement

of the suit. It appears that the letter was stolen by some one, but whether by a third person or a servant of the defendant, the defendant is not liable as for a conversion. In *Conner* v. *Allen*, 33 Ala. *supra*, it was said: "Trover is one of the actions, the boundaries of which are distinctly marked and carefully preserved by the Code. A conversion is now, as it has ever been, the gist of that action, and without proof of it the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action." On the facts shown by the record, the defendant is not liable as for a conversion of the money.

Reversed and remanded.

CENTRAL RAILROAD AND BANKING COMPANY v. CARR.

(76 Ala. 388.)

Corporation — foreign — action against, for personal injuries.

A passenger injured in his person while travelling, in Georgia, on a railroad incorporated only in Georgia although extending to and doing business in Alabama, cannot maintain an action therefor in Alabama.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Arrington & Graham and *Roquemore & Shorter*, for appellant.

McKleroy & Comer, contra.

STONE, C. J. The appellant, defendant in the court below, was sued as a corporation, and the complaint charges that it "was engaged in, and carrying on the business of a common carrier of goods and passengers for hire, and as such common carrier, it controlled and operated a railroad for the carriage of goods and passengers for hire between the city of Macon, in the State of Georgia, and the city of Eufaula, in the State of Alabama." Plaintiff then avers, that he purchased a ticket in the State of Georgia, and was travelling on said road in the direction of Eufaula, Alabama, and "while running along said railroad, and at a point near the depot or sta-

tion of Georgetown, in the county of Quitman, and State of Georgia, was thrown violently from the track of said railroad," etc. The plaintiff charges acts of negligence on the part of the railroad, which acts of negligence, he avers, caused the derailment, and his consequent serious injury, for which he instituted this suit in Barbour county, Alabama.

The appellant railroad is a corporation under the laws of Georgia, and not under the laws of Alabama, and Carr, plaintiff below, was at the time of the injury, and yet is, a resident of the State of Georgia. Plaintiff, through his attorney, made oath "that the president, or other head of the defendant corporation, and the secretary or cashier or managing agent of said corporation, all reside out of the State of Alabama." Summons issued and was returned by the sheriff served, by leaving a copy "with Charles J. McLaughlin, a white person, in the employ of the Central Railroad and Banking Company of Georgia." Code of 1879, § 2935.

Before pleading to the merits, the defendant corporation pleaded in abatement, that the Alabama court had no jurisdiction to hear and determine the cause. The special grounds set forth in the plea, on which it is claimed that the Alabama court is without jurisdiction, are, that the defendant railroad corporation was incorporated under the laws of Georgia, and not under the laws of Alabama; that the contract, under which plaintiff was being transported by defendant, was made in Georgia, that the injury of which plaintiff complained was suffered in Georgia; that at the time the said defendant was doing business under its said charter in the State of Georgia; that when the summons and complaint were issued in this cause, and ever since, plaintiff was and has been a resident citizen of the State of Georgia, and not of the State of Alabama, and that the summons and complaint in this cause were never served on its president, or any of its managing agents. These averments were not denied; but in avoidance of them, plaintiff replied, that "said defendant corporation is also engaged in business and doing business as a common carrier in the State of Alabama, and the county of Barbour, and it does business in this State and in Barbour county by its agents, and the very contract which defendant made with plaintiff, and for the failure to perform which contract, on account of defendant's negligence and breach of duty, this action arose, was a contract to transport the plaintiff from Ward's station, in the State of Georgia, to Eufaula, in the State of Alabama, as a

common carrier of passengers in both said States." The replication then avers, that affidavit was made of the non-residence of the corporation's officers, and that McLaughlin, on whom the summons and complaint were served, "was a white person in the employ of the defendant corporation in the county of Barbour and State of Alabama, at the time of the said service upon him." There was demurrer to this replication, which the Circuit Court overruled, thereby holding the replication sufficient.

There is a failure in the replication to set forth the extent of defendant's business in Alabama, and it is not shown in what manner, it is conducted. If by railroad, there is no averment that it operates a line beyond the city of Eufaula. We know that Eufaula is in Alabama, and it is perhaps common knowledge that it is near the Chattahoochee river, the dividing line between Alabama and Georgia, at that place. It may however be conceded for the purpose of this cause, that the Montgomery and Eufaula railroad, eighty miles in length, and extending from one city to the other, is owned and operated by the defendant corporation, and that it is run in connection with, and in continuation of its own railroad, chartered by the State of Georgia. This being conceded, the Central Railroad and Banking Company of Georgia has no corporate faculties which it can exercise of right, beyond the boundary of its own State. One State legislature can not confer corporate powers, to be exercised in another State. It is as to Alabama a foreign corporation, permitted to do and perform corporate functions within the latter's jurisdiction, only by comity, and that comity is granted or withheld, on just such terms and conditions as the granting State may impose.

The defendant corporation having been created and organized under the laws of the State of Georgia, the necessary consequence is, that its residence was in that State, and not in the State of Alabama. Its chief officers and business head-quarters must be supposed to have been in Georgia, where it had and has authority to construct and operate its road, and exercise its corporate faculties. Hence it is that a copy of the summons and complaint, issued from an Alabama court, could not be delivered "to the president, or other head thereof, secretary, cashier, or other managing agent thereof," as is required when a corporation is sued in the State of its residence. Code of 1876, § 2934. Hence it is that plaintiff could, as the statute requires, make oath "that the president, or

other head of the defendant corporation, and the secretary and cashier, or managing agent of said corporation, all reside out of the State of Alabama." Code, § 2935.

It has come to be common and profitable to have long lines of continuous railroad transportation, often extending through or across several States, and controlled by one management. In such cases, there is usually one controlling railroad company, which purchases or leases others, and the result is, that the managing officers reside in one State, and control a road or roads extending into one or more additional States. It is also sometimes the case, that a railroad, extending through two or more States, obtains a charter, identical in the powers and the privileges it confers, from each of the States through which it runs; thus constituting it one corporation. In the latter class of cases, the corporation is a unit, and whether sued in one of the jurisdictions or another, it cannot raise the question as to its residence, or claim that it is non-resident. It has a common residence in each of the States which gave its concurring assent to its common charter of incorporation. The following cases fall within this latter class: *B. & O. R. Co.* v. *Gallahan*, 12 Gratt. 655; *Railroad Co.* v. *Harris*, 12 Wall. 65. The present case does not fall within this class.

Like several other of the American States, Alabama has provided by statute for service of process, when non-resident corporations do business in this State through an agent, and in that other class, where the higher and managing officers of a corporation reside without the State. It is claimed for appellee, that the present suit is authorized by section 2935 of the Code, the substance of which is given above. We have other statutes which provide for service of process, when non-resident corporations do business in this State. Section 1434 of the Code relates to fire insurance companies, incorporated in other States and taking risks in this. Section 1444 makes similar provision for foreign life insurance companies doing business in this State. See Constitution of Alabama, art. 14, § 4.

In *W. U. Tel. Co.* v. *Pleasants*, 46 Ala. 641, the court held that in case of a foreign corporation, doing business in this State through a managing agent, service of summons and complaint on such agent will give jurisdiction to our courts, of a cause of action which originated in this State. The same principle is declared in *Ex parte Schollenberger*, 96 U. S. 369; *Osborne* v. *Ins. Co.*, 51 Vt. 278. It is

well setttled however that no action *in personam* can be maintained against a foreign corporation, unless the contract sued on was made, or the injury complained of was suffered, in the State in which the action is brought. *Bawknight* v. *L. L. & G. Ins. Co.*, 55 Ga. 194; *Sawyer* v. *No. Am. Life Ins. Co.*, 46 Vt. 697; *Smith* v. *Mut. Life Ins. Co.*, 14 Allen, 386; *St. Clair* v. *Cox*, 106 U. S. 350; *Newe* v. *Gt. W. R'y Co. of Canada*, 19 Mich. 336; *Parke* v. *Com. Ins. Co.*, 44 Penn. St. 422.

In *Camden Rolling Mill Co.* v. *Swede Iron Co.*, 32 N. J. Law, 15, a case of suit against a foreign corporation, and service on an agent, the cause of action did not originate in the State of New Jersey. The court said: "It may be further observed, that the interpretation contended for in behalf of the plaintiff is one that could be judicially adopted only by force of the plainest manifestation of legislative intent. It would seem to be an improbable construction; for it is difficult to believe that it was the design to place within the jurisdiction of our courts all the corporations of the world, merely from the fact that a director, clerk, or other subordinate officer happened to come upon the territory of the State."

We cannot think that it was the intention of the legislature in any of the statutes we have been considering, to allow foreign corporations to be sued in this State, except on causes of action originating in this State, or on contracts entered into in reference to a subject-matter within this State. To hold otherwise, would be to allow foreign corporations which transact business in Alabama to be drawn into our courts, for the adjudication of every contract they may make, and of every tort and wrong they may be charged with committing, even in the State which gave them being. The demurrer to the replication ought to have been sustained, and the plea to the jurisdiction held good.

There is a possible question we have not considered, namely: Where a railroad, incorporated in one State, and extending its business into another, makes a contract to be partly performed in each State, and there is a suit for the breach of such contract. Nothing in this opinion is to be construed as deciding whether or not such suit can be maintained in the State in which the corporation is simply permitted to do business by comity. We decide nothing on this question, further than that the argument above does not reach such a case.

Reversed and remanded.

EQUITABLE LIFE ASSURANCE SOCIETY v. VOGEL'S EXECUTRIX.

(76 Ala. 441.)

Executor and administrator — conflict of laws — foreign letters.

Where a resident of Alabama procured a policy of insurance on his life, through an agent residing and acting for it there, from a company chartered in New York, and died in Alabama, his executor appointed in Alabama may maintain an action on it there, although administration had also been granted in New York.

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

Gaylord B. Clark and *F. B. Clark, Jr.*, for appellant.

Overall & Bestor and *R. H. Clarke*, contra.

CLOPTON, J. The estate of a decedent, wherever he may reside at the time of his death, and in however many different States portions of the property and assets may be situate, is one estate. Notwithstanding this unity of estate, if administrations are granted in the different States where the property is located, there is not unity of administration — they are separate and independent of each other. The ancillary administration is not the agent of the administration of the domicile, although the latter is the primary administration in the sense that so far as the rights of distributees are concerned, the distribution of the personal estate is governed by the law of the domicile. Each administrator is accountable in the courts of the State of his appointment, and each administration must be settled where it is granted.

The presence of property, *bona notabilia*, is the foundation, in the absence of residence, of jurisdiction for the grant of administration. Many if not all of the States having a due and proper regard for the obligation of the sovereignty to protect creditors and others interested, who are citizens or residents, have enacted laws regulating the administration of assets within their respective territorial jurisdictions, or prescribing conditions for the exercise, by the domiciliary representative, of his right and authority within such jurisdiction. And although, as a general rule, it is said personal prop-

erty follows the person of the owner, simple-contract debts, for the purpose of granting administration, are regarded as having a *situs* in the State where the debtor resides.

The ancillary administrator alone has authority to collect the debts and receive the assets situate in the State where the administration is granted. He collects and receives them in his capacity of administrator generally. If it be conceded, that in the absence of prohibitory statutory provisions, a voluntary payment of a debt to the domiciliary representative, by a debtor residing in a different jurisdiction, there being no domestic administrator appointed, will be a good discharge, it is clear that if a domestic administrator is appointed, the foreign administrator has no authority to collect the debt, and a voluntary payment to him would be no bar to a subsequent suit brought by the domestic administrator to recover the same debt.

Notwithstanding such is the relation between the primary and auxiliary administrations, and such the authority of the ancillary, and the disability of the principal administrator, the title to all the personal property of the decedent is vested in the domiciliary representative for the ultimate purposes of administration — collecting and receiving the assets, paying the creditors and making distribution according to the law of the domicile, or to the provisions of the will, if there be one — and for the purpose of distribution, the locality of the personal property, wherever situate, is regarded as at the domicile. *Wilkins* v. *Ellett*, 9 Wall. 740. Accordingly when the auxiliary administrator has fully paid the domestic creditors, the residue will ordinarily be transmitted to the administration of the domicile, for final distribution. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors." The disability of the original administrator extends only to the remedy, as whoever sues must conform to the law of the forum. *Dixon* v. *Ramsay*, 3 Cr. 319; *Gayle* v. *Blackburn*, 1 Stew. 429; *Hutchins* v. *State Bank*, 12 Metc. 425. On this principle, the principal administrator having obtained the possession of notes, or other written evidences of debt, the transfer of which authorizes the assignee to sue in his own name, may sell and transfer them, and the transferree may maintain suit in his own name.

against the debtors in the State of their domicile. *Wilkins* v. *Ellett*, 108 U. S. 256. On the same principle, if a debtor residing in a foreign country comes within the jurisdiction of the appointment of the original administrator, so that he can be found for service of process, such debtor is suable there; and a plea that he is liable to pay only to the administrator appointed at the place of his domicile will not avail to defeat the action. Story Confl. of Laws, § 515, note 1; 3 Wms. Ex'rs, 1663, note *n*; *Merrill* v. *New England L. Ins. Co.*, 103 Mass. 245; s. c., 4 Am. Rep. 548. The original administrator may enforce by suit the payment of a debt due from a debtor in another State, the evidence of which is in his possession, when he can do so without being compelled to resort to the courts of the domicile of the debtor.

The applicability of this principle to corporations remains to be considered. A corporation has its domicile, as to debts due by it, in the State where it is chartered, for the reason that "there only can it be sued or found for the service of process." This general rule has an exception; and a corporation, like a natural person, is suable wherever it can be found for the service of process, as provided by law. When therefore a corporation has voluntarily subjected itself to suit in another State, and appointed an agent there upon whom process may be legally served, as a condition of doing business, it has a domicile in such State for the purposes of suit, and can be found there for the service of process. *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138.

In *Huss* v. *Central Railroad & Banking Company*, 66 Ala. 472, it was held that a foreign corporation, having a known place of business in this State, and an authorized agent upon whom process can be served, may plead the statute of limitations in like manner as a domestic corporation or resident citizen; and that such foreign corporation is not absent from the State, in the meaning of the exception to the statute. BRICKELL, C. J., says: "There was continuous presence here, though the domicile of the corporation was in Georgia — continuous liability to suit, and all parties having claims against them were unembarrassed because their domicile was elsewhere."

The case of the *LaFayette Ins. Co.* v. *French*, 18 How. 404, was an action brought on a judgment obtained in the State court of Ohio, against the company, which was incorporated under the law of Indiana, but did business in Ohio by its agent. The statute of

Ohio authorized service of process on such agent. The action was brought in the Federal Circuit Court for the District of Indiana. It is said: "Now when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition, upon which alone such business could be there transacted by them; that condition being, that an agent to make contracts should also be the agent of the corporation to receive service of process in suits on such contracts; and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behelf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served, or as if he had received from the president and directors a power of attorney to that effect * * * And we hold such a judgment, recovered after such notice, to be as valid as if the corporation had had its *habitat* within the State, that is, entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States."

In *New England L. Ins. Co.* v. *Woodworth, supra,* the company, which was chartered in Massachusetts, was doing business in Illinois. Letters of administration were granted by the proper court in Illinois on the estate of the assured. The administrator commenced the action against the company in a court of the State, which was removed to the United States court. The statute of Illinois required every life insurance company, not incorporated in Illinois, to appoint in writing a resident attorney, upon whom all lawful process might be served with like effect as if the company existed in that State, with a stipulation, that process served on the attorney should be of the same force and validity as if served on the company; and the statute provided, that service on such attorney shall be sufficient service on the company. BLATCHFORD, J., says: "In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule, that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration." The right of the

Illinois administrator to maintain the suit was sustained, although the domicile of the assured was neither in Illinois nor in Massachusetts.

The administrator appointed in New York has never had possession of the policy, and has not commenced any suit against the defendant in that State. Upon the authorities cited, as well as on principle, we hold that on the facts stated in the replication, the defendant had a domicile in this State, in the meaning that the debt on the policy is an asset at its domicile; and that the defendant is suable in the courts of this State, as process could be and was served in the manner provided by the law. Such asset is subject to administration in this State.

The plaintiff having been qualified as executrix by a court having jurisdiction where the decedent had his domicile at the time of issuing the policy, and at the time of his death, and having the title and possession coming to her, has the right to collect the debt, if she is not compelled to resort to a suit in New York. For this purpose she is authorized to bring and maintain this action. The City Court having jurisdiction of the subject-matter and the parties, the judgment she has obtained is entitled to the same faith and credit in New York as in Alabama notwithstanding an administrator had been appointed in New York. No such injustice can ensue as a double satisfaction, unless by the *laches* of the defendant. Judgment in this suit and its payment will operate to bar any subsequent action that may be brought by the New York administrator. *Wallace* v. *McConnell*, 13 Pet. 136; *Whipple* v. *Robbins*, 97 Mass. 107; Whart. Confl. of Laws, § 626. "The priority of suit will determine the right."

We have not deemed it necessary to consider the distinction made in some cases in favor of the right of an executor over an administrator appointed in one State, to collect debts due from debtors residing in another. As in this State, letters testamentory must be granted before the executor is invested with any authority over the assets, we prefer to rest our decision on principles applicable alike to both.

The demurrer to the replication was properly overruled.

Judgment affirmed.

South and North Alabama Railroad Company v. Huffman.

(76 Ala. 492.)

Carrier — railroad — unlawful expulsion.

The plaintiff having purchased at Birmingham a ticket to Hanceville, a station ten miles beyond Blount Springs, entered a freight train which was not authorized to carry passengers beyond Blount Springs; he testified that the ticket agent directed him to take it; being informed by the conductor, after starting, that he could not be carried beyond Blount Springs, he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on, and having surrendered his ticket, which the conductor thereupon cancelled, he travelled to Blount Springs, and was there required by the conductor to leave the train. *Held*, that the company was not liable unless the ticket agent gave that direction.*

ACTION for unlawful expulsion from railroad train. The opinion states the case. The plaintiff had judgment below.

Hewitt & Walker and *Thomas G. Jones*, for appellant.

McAdory & Gillespie, contra.

Stone, C. J. Since railroads have been constructed, they have driven from the field almost every other mode of travel and transportation between points connected by them. They are huge enterprises, requiring very many officers, agents and employees for their successful operation. The travelling and shipping public, in having transactions with them are brought in contact only with their officers and employees of relatively inferior grade. The traveller sees and knows only the local ticket agent, the conductor, and perhaps the baggage master. To him they present the embodiment of the corporation, to whom he must look for protection, and to a limited extent, instruction. He is not presumed to know the rules and regulations of the company; for of necessity they must be many, and to the uninformed, intricate. His purpose is travel or transportation to a given point, and the railroad officials must supply the details. He has neither the requisite knowledge nor power to furnish these. If travel be his aim, he approaches the ticket agent, informing him of his point of destination. Paying

* See *Murdock* v. *Boston & Albany R. Co.* (137 Mass. 293), 50 Am. Rep. 307; *Int. G. N. Ry Co.* v. *Hassell* (62 Tex. 256), 50 Am. Rep. 525, and note 527.

for the ticket the price demanded under the tariff of charges, he has done all required of him to secure his right of transit over the railway to the point or station to which he requested a ticket.

It is claimed for plaintiff and was so testified by him, that his application for a ticket was made late in the afternoon, or evening —according to his version, after six o'clock. He informed the agent that he wished to go that evening to Hanceville, and he obtained a ticket to Hanceville. He further testified that the ticket agent pointed out to him a freight train with caboose attached, then about to leave in the direction of Hanceville, and informed him that was the train he should go on. He entered the train and remained there until the train moved off soon afterward. Up to this time, the plaintiff's testimony is all that sheds any light on the transaction. This closes all connection with the ticket agent.

The plaintiff and the conductor differ as to what took place after the train was put in motion. The conductor called for plaintiff's ticket, as he says, some two to four hundred yards from the point of departure, and within the corporate limits of Birmingham, where plaintiff entered the train. The plaintiff says it was three or four miles after they had left the depot. In all else there is no substantial difference between them. As soon as the ticket was shown to the conductor, he informed plaintiff he was on the wrong train, and that under his orders he was not permitted to carry him beyond Blount Springs, a station some ten miles short of Hanceville. He then proposed to plaintiff to stop his train and permit him to get off. Plaintiff replied that he had a ticket to Hanceville, and wished to go there, and that the ticket agent had pointed out this as the right train. The conductor still informed him he would be compelled to put him off at Blount Springs, and could not carry him to Hanceville, and he offered plaintiff the privilege of then getting off. Plaintiff replied that he would go on. The conductor then took possession of the ticket and cancelled it. Nothing further is shown until the train stopped at Blount Springs. At Blount Springs the plaintiff importuned the conductor to let him proceed to Hanceville, and was unwilling to leave the train. The conductor again informed him he had no authority to carry him farther, and that he, the conductor, would lose his place if he did so. He further informed the plaintiff that he must leave the train, or he, the conductor, would have to put him off. On this representation the plaintiff left the train, unwillingly and under pro-

test, ten miles short of Hanceville, his destination. There was testimony that the train on which plaintiff travelled — a freight train with caboose attached — was, under the road's regulations, permitted to carry passengers between Birmingham and Blount Springs, but no farther north. This presents all the material aspects of the testimony.

It is common knowledge that railroad corporations usually employ two classes of trains — one for passengers and another for freight. Freight trains do not generally transport passengers, and when they do so it is by permission of the railroad's management; and when the permission is granted, it may be done with any reasonable limitations the management may impose. There is this qualification: a railroad, being a common carrier, cannot discriminate between persons if such persons conform to the rules of the corporation. Less than this could not be classed as a rule. We can perceive nothing unreasonable in the rule or regulation which it is claimed was imposed on this train. If such regulation be shown to exist, then the conductor committed no wrong in requiring the plaintiff to leave the train at Blount Springs. In this connection and to this end the Circuit Court should have permitted the defendant to prove the regulation by the order itself. It was admissible for no other purpose.

It is contended for appellee that the conductor was guilty of a tort in this, that after taking and retaining plaintiff's ticket, which on its face secured to him transportation to Hanceville, he had no right to eject him from the train until he was carried the full distance the ticket called for. This would probably be the case if the conductor had silently taken and cancelled the ticket without giving to plaintiff the requisite information. The testimony however tends to show that at the first sight of the ticket the conductor informed the plaintiff he could not carry him beyond Blount Springs, and that he then proposed to stop the train and allow plaintiff to get off. The testimony further tends to show that plaintiff declined to get off, saying he would go on. If this be so, then plaintiff must be held to have elected to use and get the benefit of his ticket as far as Blount Springs; and doing so, the conductor had no authority to require him to leave the train until he reached Blount Springs. If he had done so he would have been guilty of a tort. The ticket secured plaintiff's right of transportation over defendant's road as far toward Hanceville as the train he

was on had authority to carry him. Availing himself of this right he cannot complain that his ticket was taken up and cancelled. To hold otherwise would be to require the road to carry plaintiff to Blount Springs without compensation, notwithstanding he elected to go so far. If the road's instructions were such as is claimed we see no evidence of wrong done either by the railroad company or by the conductor, so far as the conduct of the latter is concerned. He did only what he was bound under his instructions to do, and there is no evidence that he used any violence, force or rudeness in doing so.

Recurring to the conduct of the ticket agent: There are many adjudged cases in which railroad corporations have been held responsible for injuries resulting from erroneous advice or instructions given by the officers of the corporation. The case of *Burnham* v. *Gr. Trunk R'y Co.*, 63 Me. 298; s. c., 18 Am. Rep. 220, was a case where the erroneous instruction was given by the ticket agent. Of similar import are the following cases: *Galveston H. & San A. R. Co.* v. *Donahoe*, 56 Tex. 162; *Beauchamp* v. *Inter. & Gr. N. R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. Cas. 207, 287. In the following cases the fault lay with the conductor: *Lambeth* v. *N. C. R'y Co.*, 66 N. C. 494; s. c., 8 Am. Rep. 508; *Ga. R. & Banking Co.* v. *McCurdy*, 45 Ga. 288; s. c., 12 Am. Rep. 577; *Palmer* v. *Railroad*, 3 S. C. 580; s. c., 16 Am. Rep. 750; *Vankirk* v. *Penn. R. Co.*, 76 Penn. St. 66; s. c., 18 Am. Rep. 404; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381; s. c., 45 Am. Rep. 464. In all these cases it was ruled that the railroad corporation was liable for the erroneous advice and direction given by its agents in charge. We think the rule a sound one, and will adopt it. See also Redfield on Railways, 98* *et seq.*; *Laurans* v. *R. Co.*, 15 Minn. 49; s. c., 2 Am. Rep. 102; *Toledo, W. & W. R'y Co.* v. *Wright*, 68 Ind. 586; s. c., 34 Am. Rep. 277; *Toledo, P. & W. R'y Co.* v. *Pindar*, 53 Ill. 447; s. c., 5 Am. Rep. 57; *Piedmont & A. Life Ins. Co* v. *Young*, 58 Ala. 476; *M. & E. R'y Co.* v. *Kolb*, 73 Ala. 396.

In the case of *Wilkinson* v. *Searcy*, at this term, we defined with a good deal of care the nature and character of a tortious act, which will authorize vindictive or punitive damages. We have no wish to repeat or depart from what we there said. We hold that the last two charges asked by defendant — those relating to vindictive damages — ought to have been given.

Reversed and remanded.

CENTRAL RAILROAD AND BANKING COMPANY v. SMITH.

(76 Ala. 572.)

Corporation — ultra vires — personal injury.

A corporation chartered only as a railroad and banking company, although it has no authority to run a steamboat, is still liable to a passenger injured on a steamboat operated by it. (*See note, p.* 358.)

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

John D. Roquemore and *John Peabody*, for appellant.

S. F. Rice and *H. R. Shorter*, contra.

CLOPTON, J. The Central Railroad and Banking Company was chartered by the State of Georgia, for the purpose and with power to construct and operate a railroad from Savannah to Macon, and to organize and do a banking business. The complaint alleges that the defendant and one Whitesides were the owners and proprietors of a steamboat called the George W. Wylly, and were engaged in operating the same on the Chattahoochee river, for the carriage of passengers and freight from Columbus, Georgia, to Apalachicola, Florida, and intermediate landings. The action is brought by appellee, to recover damages for injuries sustained, while a passenger on the boat in April, 1883.

[Minor matters omitted.]

The merits of the case involve the consideration of the questions, whether the corporation has power, under its charter, to own steamboats, and to engage in association with a natural person, in the business of carrying persons and freights on the Chattahoochee river, and if without power, whether under any, and what circumstances, it is liable to a passenger for injuries resulting from the negligence or unskillfulness of those in charge of the boat.

The general rule, that corporations created by an act of the legislature, or organized under general laws, can exercise only the powers expressly granted, the implied powers necessary and proper to carry into effect the express powers, and such incidental powers as pertain to the purposes of their creation, is not controverted. It may be

conceded, that a railroad company, in the absence of express power, is authorized to make tariff arrangements for transportation by water, or may purchase, own, and operate steamboats, or other water-craft, when such an arrangement or business legitimately pertains to the corporate purposes, or may reasonably be inferred to have been contemplated and intended by the creating power. Such power is incidental to the purposes of the corporation, and such inference is reasonable, when a railroad company is incorporated with power to construct a railroad between fixed and designated *termini*, and to effectuate the construction it is necessary to cross navigable rivers, bays, or arms of sea, which on account of their width and depth, or from other causes, cannot be bridged; or when a body of water, lying at the termination of the railroad proper, separates it from the metropolis, to and from which it was contemplated, intended, and is necessary to transport freight and passengers conveyed over the road, — "from the ostensible and substantial *termini* of their route," or when the act under which the company is organized authorizes it "to contract for the transportation and delivery of, and to deliver persons and property conveyed over their road, beyond its *termini*." *Wheeler* v. *S. F. & A. R. Co.*, 31 Cal. 46; *Shawmut Bank* v. *Plattsburgh, etc., R. Co.*, 31 Vt. 491; *So. Wales R. Co.* v. *Redmond*, 10 C. B. (N. S.) 674. In such cases, the power is implied, as necessary and proper to accomplish the objects of the incorporation; or is incidental, pertaining to its purposes as expressed in the charter or general law, and without which the express powers are ineffectual.

In *Wheeler* v. *S. F. & A. R. Co., supra*, it is said: "It is one thing to build and own a line of steamers to some foreign country, or some distant port, carrying on a wholly distinct and independent business entirely foreign to the objects of a railroad corporation, which might just as well, and a great deal better, be transacted by some other company organized for the purpose, and quite another, to own and control steamboats for crossing rivers and bays in the line of the road, and the use of which is convenient, proper, and necessary to a successful accomplishment of the objects for which the road is built and operated." It may be stated, generally, that a corporation has no power to engage in any business, not authorized by the law of its creation, and a railroad company is unauthorized to use or apply its funds in aiding and carrying on business foreign to, and unconnected with its proper and legitimate purposes

and objects, although the design and effect may be to augment the business of the road, and increase the profits of the corporators. Under the operation and application of the general rule, it has been held, that a company incorporated for the construction of a plank-road between designated points, with the right to take tolls, is not authorized to establish a stage-line on their road (*Wiswall* v. *G. & R. P. R. Co.*, 3 Jones Eq. 183); that a corporation chartered to lay out, make, and keep in repair a road from a point in the vicinity of Mt. Washington to the top of the mountain, and to take tolls, and to build and own toll-houses, had no authority to establish stage and transportation lines (*Downing* v. *Mt. Wash. R. Co.*, 40 N. H. 230), and that corporations organized to construct and operate railroads have no power to buy steamboats to run in connection with their roads. *Pearce* v. *M. & Ind. R. Co.*, 21 How. 441. Lord LANGDALE, as quoted by Mr. Justice CAMPBELL, in the case last cited, says: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all business required for its proper use when made. But I apprehend that it has nowhere been stated, that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been properly admitted, that railway companies have no right to enter into new trades or businesses, not pointed out by the acts. But it has been contended, that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profits of the shareholders. There is however no authority for any thing of that kind." The statute of creation, construed as including not only the expressly granted powers, but also implied and incidental powers — powers necessary and directly appropriate to the execution of the express powers — is the measure of the powers of the corporation and operates to the exclusion of all others.

A late decision of the Supreme Court of Georgia has rendered a further discussion of the question unnecessary. In *Gunn* v. *Cent. R. & Banking Co.*, that court has construed the powers conferred by the charter of the defendant, and held that the corporation has no power to enter into a partnership with a natural person to purchase and run a steamboat on one of the rivers of that State. This decision was made in a suit brought by a passenger on the same

steamboat, to recover damages for injuries sustained at the same time and under the same circumstances as the plaintiff in the present action. If we entertained doubt of the power of the defendant to engage in such business, when it is said, "to be in doubt is to be resolved," comity would suggest an acceptance of, and acquiescence in the construction of the statutes of that State, under which the corporation was organized, by the court of last resort. We observe however an allusion to another statute, which authorizes railroad companies "to build, construct, and run as part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business of such companies." This statute does not appear in the present record, and cannot be, and is not considered by us.

With the postulate assumed, that the defendant has no authority to own and operate, in association with a natural person, a steamboat on the Chattahoochee river, for carrying persons and freights, there remains to be considered the liability of the defendant to a person for injuries suffered on a boat thus owned and operated while a passenger thereon.

This court has repeatedly decided, that the contracts of corporations, which they have no power to make, are void, and that the courts will not enforce them. "Such contracts on the part of a corporation are *ultra vires* and void, and no right of action can spring out of them." *Marion Sav. Bank* v. *Dunkin*, 54 Ala. 471; *Chambers* v. *Falkner*, 65 Ala. 448. No contract made by a corporation, not within the scope of its powers, can be made valid, or the foundation of a right of action by the assent of the shareholders. If the corporation attempts to carry such contract into execution, dissentient stockholders, though a minority, may restrain its consummation. And if suit is brought against the corporation on such contract they may avail themselves of the defense of *ultra vires*. *Davis* v. *Old Col. R. Co.*, 131 Mass. 258; s. c., 41 Am. Rep. 221. The settled doctrine of this court is, that a reception and retention of the fruits and benefits of the transaction do not estop the corporation from denying its power to make the contract; though an action may be maintained, in a proper case, against a corporation, for the money or property received, the legal effect of such suit being a disaffirmance of the prohibited contract.

Were the present action founded on a contract of transportation, it is unquestionable, that the defendant could successfully interpose

the defense of *ultra vires*. The action is however *ex delicto* founded on the common-law duty of a common carrier. The plaintiff does not require the aid of an illegal contract to establish his case; its enforcement is not necessary to entitle him to a recovery. The rules applicable are those which govern in cases of torts committed by a corporation. The question is, what is the liability of a corporation for a tort committed while transacting a business without and beyond the purview of the corporate powers and purposes? This is followed by another question, by what authority, and in what manner can a corporation be subjected to such liability?

While as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established, that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case the doctrine of *ultra vires* has no application. *Mer. Bank* v. *State Bank*, 10 Wall. 604. "A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its general powers the wrongful transaction or act may be." *N. Y. & N. H. R. Co.* v. *Schuyler*, 34 N. Y. 30. Accordingly actions have been maintained against corporations for libel, malicious prosecutions, assault and other torts too numerous to be mentioned. *Green* v. *Lon. Gen. Om. Co.*, 7 C. B. (N. S.) 290; *P. W. & B. R. Co.* v. *Quigby*, 21 How. 202; *Jordan* v. *Ala. Gt. So. R. Co.*, 74 Ala. 85. Generally it may be said that corporations are liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental. The distinction between the liability of a corporation on an unauthorized contract, and for a negligent or wrongful act in the performance of such contract, is clearly and properly drawn by SELDEN, J., in *Bissell* v. *Mich. So. & No. Ind. R. Cos.*, 22 N. Y. 258, which was an action by a passenger on a train of cars which by contract the two companies were unitedly running, for a breach of duty to convey him safely, the passenger having been injured by the negligence of their servants. The defense of the companies was that in making the contract they transcended their powers, and consequently, in judgment of law, they were not operating the road, and did not undertake to

carry the plaintiff over it. After holding that the contract to operate the consolidated roads and to transport the plaintiff was illegal and void, he says: "It is said that if the contract was *ultra vires*, and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this I apprehend by no means follows, though it is probably true so far as the duty to observe due care grows out of the contract. The plaintiff's claim however rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others." An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles it follows that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal.

[But on another ground]

Reversed and remanded.

NOTE BY THE REPORTER. *See Harriman* v. *First Bryan Baptist Church*, 68 Ga. 186; s. c., 36 Am. Rep. 117.

In *New York, Lake Erie & Western Railway Co.* v. *Haring*, New Jersey Court of Errors and Appeals, 47 N. J. L. 137, it was *held* that where the plaintiff was injured by the mismanagement of a street horse car, the defendant's contention, that as the corporation had no franchise it could not be liable to the action, was untenable. The court said: "The ground assigned was that the plaintiff in error could not legally undertake the employment in question, not having been vested with the requisite franchise, and that consequently it was not, in its corporate capacity, liable for any of the consequences of such employment. But the doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up, that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defense. If

corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defense, then corporations have a dispensation from liability for these acts peculiar to themselves. There does not appear to have been much discussion of this subject, but a case decided by the Supreme Court of Tennessee is directly on the point. The precedent referred to is reported in 53 Tenn. 634, and is entitled *Hutchinson* v. *Western & Atlantic R. Co.* It was an action against a corporation for damages occasioned by the negligence of its employees. It appeared that the railroad company was without authority running a line of steamers, and the plaintiff had been hurt by the mismanagement of one of them. The defense of *ultra vires* was interposed in that case as in the present, but it was rejected on the ground that such doctrine had no application to torts of that character. This exception cannot prevail."

In *Buffett* v. *Troy & Boston R. Co.*, 40 N. Y. 168, the defendant chartered to operate a railroad between Troy and the State line at Pownal, ran a stage sleigh to carry passengers, between the station at Schaghticoke and that village, about a mile distant. "It was the practice to start the sleigh at the upper end of the village, picking up passengers as it proceeded down the street; the driver was furnished with railroad tickets by the company, and sold them to passengers, usually, after their arrival at the station, but sometimes at the village; the plaintiff on this occasion rode in the sleigh toward the station, for the purpose of taking a passage to the city of Troy, but was injured before reaching the station." The court said: "The objection is made that the defendants, being incorporated to carry passengers between Troy and Pownal, have no power or authority to enter into contracts for transportation on or over any territory not included between those points, and that their authority is to transport by railroad and not by stage. These objections have been fully considered in the cases already decided in this court. *Hart* v. *Rensselaer & S. R. Co.*, 8 N. Y. 37, decided that where a company made a contract for transportation of persons and property beyond its own line, and over the line of another company, it was responsible for a failure to perform such contract. *Quimby* v. *Vanderbilt*, 17 N. Y. 306, is to the same effect. The action however was against an individual and not against a corporation. In *Birdsell* v. *Michigan, etc., R. Co.*, 22 N. Y. 258, where a passenger was injured upon being transported beyond the authorized lines of the defendant, the same result was reached. Elaborate opinions were delivered by COMSTOCK, C. J., who held that the defendants were liable upon the contract specifically as a contract, and by SELDEN, J., who held the contract to be *ultra vires* and void, but that the defendants were liable for their negligence, independent of any existing contract. Without settling upon which ground the liability should be placed, the court had no difficulty in determining that they were liable. The case therefore is a clear authority in favor of the plaintiff here. See also *Cary* v. *Cleveland & Toledo R. Co.*, 29 Barb. 35; *Weed* v. *S. & S. R. Co.*, 19 Wend. 534. There can be no room for doubt on these cases that when a corporation undertakes a transportation beyond its chartered line of railroad, and an injury to

the person occurs, the corporation is liable in damages. Whether this injury occurred upon another railroad track, or upon a common road used by it in the same business, would seem to be quite unimportant. The principle being established that it is liable for injuries occurring at the point in question, all else follows. A break or loss of a bridge often compels a railroad to transport the passengers a short distance by stage or boat, around the obstruction. It could not be successfully contended that they were not bound to care in this transportation, or that they were not responsible for the want of it."

One judge dissented.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

BARRETT v. BELL.

(82 Mo. 110.)

Landlord and tenant — appurtenances.

On a lease of hotel property, a kettle, situated on the lessor's adjacent lot, and used by him in connection with the hotel, does not pass as appurtenant, when not indispensable to the enjoyment of the hotel. (*See note, p.* 364.)

ACTION of damages. The opinion states the case. The plaintiff had judgment below.

Smith & Kranthoff, for appellant.

January & White, for respondent.

SHERWOOD, J. Action brought before a justice of the peace to recover damages alleged to have been suffered by plaintiff, because of the removal by defendant of a certain iron kettle from certain premises alleged to have been leased to the plaintiff by the defendant, and it was also alleged in the complaint that the kettle was a fixture, and constituted a portion of the leased premises, *i. e.*, the "Bell house" and the property appurtenant thereto. The answer of the defendant was a general denial.

Upon the trial, the plaintiff testified in his own behalf, that since June, 1880, he had been the proprietor of the "Bell House" in the town of Holden, and in connection with it used the kettle in question for heating water with which to scrub the floors and clean the hotel. The kettle was situated on lots 30 and 31, north of the hotel; that he had possession of the "Bell House" by virtue of a written lease made by the defendant to one R. P. Hall, dated October 1, 1878, for three years, and by Hall assigned to him on July 1, 1880, with the consent of defendant.

The said lease was then offered in evidence. The portion material to this case was the granting clause, which was as follows: "That the said Richard Bell has this day leased and rented to the said R. P. Hall, for and during the three years from and after the first day of October, 1878, the Bell House in the town of Holden, Johnson county, Missouri, situate on the north part of lots 60 and 61, said ground being forty-six feet front on Pine street by one hundred and thirty-eight feet deep in said town, with all the appurtenances thereunto belonging."

It is quite apparent from the language of the complaint, as well as the language of the lease, that the controlling question in this case is whether the kettle, which was not on the lots specified in the lease, but was set in an iron arch or furnace, situated on lots 30 and 31, north of the hotel, and separated from the lots on which the hotel was built by an alley some twelve feet in width, was one of the "appurtenances" belonging to the hotel and embraced within the terms and specifications of the lease. The lease, it will be noted, and as before stated, does not embrace the lots on which the kettle was situated, nor is there any evidence that defendant was owner of those lots.

The term "appurtenances" carries with it no rights or interest in property of the grantor on other lands which he owns, lands not included in the deed under which the grantee claims. *Bolton* v. *Bolton*, 11 Ch. Div. 968; s. c., 32 Moak's Eng. Rep. 927; *Leonard* v. *White*, 7 Mass. 6. It cannot be made to include any thing not situate on the land described, though it belong to the grantor and be used by him in his business. *Frey* v. *Drahos*, 6 Neb. 1; s. c., 29 Am. Rep. 353. In that case the mortgage described the property as "one frame grain elevator warehouse situated on the ground of the Sioux City and Pacific R. R. Co., east of their side track, etc., etc., with all the appurtenances thereto belonging." Other property however in

addition to that mentioned was sold under the mortgage, to-wit: An engine and boiler complete, grate-bar, wrenches, gauge-cock, pump and pipe, rubber belt, bars of iron, one engine-house, one Fairbanks scales complete, and one office ten by twelve feet in size. as among the "appurtenances" embraced in the mortgage. The office building and Fairbanks scales, engine, etc., were at least one hundred feet distant from the elevator warehouse, and used by the owners in the prosecution of other business, as well as in handling grain; and the engine, etc., was also used for other purposes, and was not connected with the machinery of the warehouse, except as occasionally connected by means of the rubber belt, when that machinery was in operation; and when not so in operation the rubber belt was taken off and laid aside; and it was ruled that no property outside of that described in the mortgage passed by that instrument, or was embraced in the general term "appurtenances thereto belonging."

And where there was a conveyance of a specific tract of land, this was held not to carry with it, as appurtenant, property not situate upon the land described. And this rule was applied to a case of a well and an out-house on an adjoining tract owned by the grantor, and to a way to them over such tract. *Grant* v. *Chase*, 17 Mass. 443. Again, it does not appear in evidence that the use of the kettle was indispensable to the enjoyment of the premises conveyed, and unless this were so, such use could in no circumstances be regarded as appurtenant to the hotel. The lease was still effectual and the hotel useful after the kettle was taken away. The fact that the kettle was a convenience does not make it an appurtenance nor have any effect upon the construction of the lease. *Spaulding* v. *Abbott*, 55 N. H. 423, and cases cited.

In a well-considered case in the Court of Appeals of New York it was said: "Easements exist as appurtenant to a grant of lands, and as arising by implication. only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as incident or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. * * * When the necessity ceases, the rights resulting from it cease. A mere convenience

is not sufficient to create or convey a right or easement, or impose burdens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls. *Ogden* v. *Jennings*, 62 N. Y. 526, 531, and case cited, pages 531, 532.

In a valuable work on Landlord and Tenant, the following is deduced as the rule: "The true test as to whether a thing is an incident or appurtenance seems to be the propriety of relation between the principal and adjunct, which is to be ascertained by considering whether they agree in nature and quality, so as to be capable of union without incongruity, and is actually and directly necessary to the full enjoyment of the property." Wood Land. and Ten., § 213, pp. 310, 311, and note on p. 312.

As the evidence in this case does not show the use of the kettle was a "necessity," this fact deprives such use of the chief attributes of an appurtenance. "It was a matter of ease and convenience only," which having arisen by mere consent of the parties, could be destroyed by withdrawing that consent at any time. *Grant* v. *Chase, supra; Johnson* v. *Jordon*, 2 Metc. 234.

For these reasons the cause was not tried upon the correct theory, and the judgment should be reversed and the cause remanded.

All concur, except HOUGH, C. J., absent.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Lucas* v. *Bishop*, Tennessee Supreme Court, September, 1885, it was held that the conveyance of a spring carries with it no easement in the shade of a tree ten feet distant on other lands of the grantor. The court said: "The reservation and grant are not of the use of the spring, but of the spring itself, and convey the land which the spring occupies. The grant includes what is reasonably necessary to the enjoyment of the thing granted and appurtenant thereto. 3 Wash. Real Prop. (3d ed.) 336, 340. A thing appendant or appurtenant is defined to be 'a thing used with and related to, or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appended or appurtenant.' It results therefore, say the authorities, that land can never be appurtenant to other land, or pass with it as belonging to it. 3 Wash. Real Prop. (3d ed.) 340. The grant being of the land containing the spring, which would no doubt include so much of the land as was essential to the enjoyment of the spring in the usual mode, would not extend to other land beyond what was reasonably necessary to its use. A tree is, of course, a part of the land on which it grows, although the roots below and the branches above may extend beyond the boundary of the tract. If therefore the tree in controversy was not on the land covered by the grant of the spring it could not be claimed as appendant or appurtenant to the spring, or essential to its enjoyment. The proof does not show that the tree was inclosed by the

fence which the plaintiff erected around the spring, nor does the plaintiff claim it as being on his land. The fair inference, on the contrary, is that the damage insisted upon was merely caused by the loss of the shade of the heavy top and overhanging branches. And although the roots of the tree extended to the spring it is not shown that they were material to the walls of the spring Nor if they were, is it seen how the fact would give the plaintiff any right to the tree any more than the existence of a rim of limestone at the spring would give a right to the limestone under the tree. That the shade of a tree may happen to extend to a spring cannot possibly be held to make the tree an appurtenant to the spring even without the general rule already cited."

SMITH v. SHELL.

(82 Mo. 215.)

Statute of frauds — time and place of delivery.

Under the statute of frauds, a contract for the sale of goods need not specify time or place of delivery; but if plaintiff testifies that time or place was agreed upon, and the contract does not specify it, he cannot recover on it.

ACTION for breach of contract for sale of goods. The opinion states the case. The plaintiff had judgment below.

Ira Hall, for appellant.

Macfarlane & Trimble, for respondent.

HENRY, J. This is a suit by which plaintiffs seek to recover damages for breach of a contract for the sale and delivery of one thousand barrels of corn, alleged to have been purchased by them of the defendant. The petition alleges in substance, that on or about the 1st of November, 1879, they bought of defendant one thousand barrels of corn, a portion of which was then cribbed or penned, and the balance ungathered, for which plaintiffs were to pay $1,035, ten of which was paid, and the balance to be paid when defendant should gather and put the balance of the corn in pens. That he agreed to gather and put it in pens within a reasonable time thereafter, in order that plaintiffs might have the same in readiness to ship and sell upon any rise in the market that might

the writing cannot be used as evidence of the agreement between the parties." Hilliard Sales, 232. And to the same effect are the authorities above cited. *Boardman* v. *Spooner*, 13 Allen, 359. If the suit is for a non-delivery of the goods sold, the plaintiff must fail in such a case; but if sold by a written contract, and delivered, the vendor may recover in a proper suit, because the delivery and acceptance of the goods satisfies the statute. In the case at bar plaintiff sued on one contract, and was permitted to recover upon one different in its terms. Both on reason and authority, in the light of Lowry Smith's testimony, we think that the memorandum relied upon by plaintiffs is insufficient under the statute, and the defendant's second refused instruction to that effect should have been given.

The evidence introduced by plaintiffs to the effect, that in November, 1879 (whether before any controversy arose between the parties, or not, does not appear), defendant offered plaintiff $100 to release him from the contract was inadmissible, if made by way of compromise after the controversy arose, and if made before, has no tendency to prove any allegation in plaintiff's petition. It throws no light upon the question of damages, for the defendant may have been willing to give $100 rather than comply with the contract, on grounds other than that of a rise or fall in the market. Notwithstanding the price he was to get may have been the full market value of the corn when sold, and at the time it was to be delivered, with no prospects of a rise in the market, yet he might have been willing to give that sum of money to get rid of the trouble and worry of getting the corn ready for delivery at the time agreed upon.

The judgment is reversed and the cause remanded.

Judgment reversed.

SHERWOOD and RAY, JJ., concur; NORTON, J., dissents; HOUGH, C. J., absent.

HUMES v. MISSOURI PACIFIC RAILWAY COMPANY.

(82 Mo. 221.)

Constitutional law—Double Damage Act.

The statute making railroads liable in double damages for stock killed in consequence of their neglect to fence is constitutional. (*See note, p.* 375.)

ACTION for killing stock. The opinion states the case. The plaintiff had judgment below.

Thos. J. Portis, for appellant.

T. K. Skinker, for respondent.

PHILLIPS, C. This is an action instituted in the Circuit Court of the city of St. Louis under what is properly known as the forty-third section of the General Corporation Law of this State, for double damages for killing plaintiff's mule on defendant's railroad. The plaintiff recovered judgment for $135, which on motion of the plaintiff was doubled by the court, and judgment entered accordingly. From this judgment the defendant appealed to the Court of Appeals where the judgment of the lower court was affirmed *pro forma.* Defendant has brought the case here on appeal.

I. This court is invited by appellant, in a most elaborate and creditable argument, to again consider and determine the constitutionality of said forty-third section. The constitutionality of this section of the statute was fully considered and affirmed in the case of *Barnett* v. *Railroad Co.*, 68 Mo. 56; s. c., 30 Am. Rep. 773, which was followed in *Cummings* v. *Railroad Co.*, 70 Mo. 570. But counsel urge these decisions were under the Constitution of 1865, quite unlike certain provisions of the Constitution of 1875. The validity of this section under the Constitution of 1875 was considered by Judge HOUGH in the opinion delivered by him in *Barnett* v. *Railroad Co.*, in so far, at least, as the validity of the law was involved in giving the penalty over and above the actual value of the animal to the owner thereof, instead of to the school fund as appellant now insists should be done. So the validity of this sec-

tion was directly presented under the Constitution of 1875 in the case of *Spealman* v. *Railroad Co.*, 71 Mo. 434. The opinion in this last case was written by NORTON, J., who was an active and prominent member of that convention. The questions presented therein for determination were the effect upon this statute of article 5 of the amendments to the Constitution of the United States, which declares that "no person shall be deprived of life, liberty or property without due process of law;" also of article 14 of the Federal Constitution, which provides that "no State shall deprive any person of life, liberty or property without due process of law;" and also of article 11, section 8 of the Constitution of 1875 of Missouri, which provided *inter alia* that "the clear proceeds of all penalties and forfeitures, etc., shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund." To his opinion from his high vantage ground I should hesitate to oppose any antagonistic view of my own, touching the points decided. By these adjudications I feel bound. No view entertained by me, if dissentient, could avail the appellant. I shall therefore discuss only such questions raised by the appeal as are not within the matters so adjudicated by this court.

II. It is now urged that the double liability clause of section 43 is repugnant to section 20 of article 2 of the Constitution of 1875, which declares "that no private property can be taken for private use, with or without compensation, unless by the consent of the owner." This provision, in so many words, was not in the Constitution of 1865. It is contended that so much of the damages allowed the owner of property injured by a railroad as exceeds its actual value is, in effect, taken from the company without compensation to it and against its assent. The logic of this argument literally taken would exempt the company offending from single damages, for it receives no compensation at all where it merely destroys the property of the citizen, and gives presumably only an enforced assent to making restitution in single damages. It would apply with equal force, looking alone to the literal language of the Constitution, to any taking of property in satisfaction of any claim for damages. As the right to take it is made to depend on the consent of the party, the result would follow that the injured party could not recover any damage from the wrong-doer. We do not think this provision of the Constitution was aimed at section 43, or its cognates to be found in the statute. We can conceive of a

more rational purpose in its adoption, predicated of the history of the adjudications of the courts of this State, as well as the current history of the times developing so many devices and schemes by individuals, legislatures and municipalities to obtain private property against the owner's consent for purely private purposes. It was, for instance, early decided by this court in *Cooper* v. *Maupin*, 6 Mo. 624, that a right of way from necessity from one part of claimant's land to another part of the same tract, over the land of another, could not exist. While in *Snyder* v. *Warford*, 11 Mo. 513, it was held that a right of way of necessity exists in all cases in which an individual owns land surrounded by other lands excluding him from any public highway, and that the legislature might provide by enactment a mode for securing such right to the individual land owner. And in *Dickey* v. *Tennison*, 27 Mo. 373, the court held that the legislature could not under the semblance of nominating it, "An act to establish a neighborhood road in the county," evade the rule of justice that prevented the taking of private property for private use. In the course of his opinion Judge SCOTT held that the constitutional recognition of the right of eminent domain for the public use gave no implication for the taking of private property for private use. So the first part of said section 20 of the Constitution, in illustration of what Webster said, that "written constitutions sanctify and confirm great principles." declared that "no private property can be taken for private use with or without compensation, unless by the consent of the owner." But as if recalling the adjudications of this State, and the great hardships under the common-law limitations under some circumstances, it immediately followed up the opening generality of the section with the following: "Except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law." It was always the common law of the land that private property could not be taken for private use against the owner's consent. It springs from the inviolability of individual right, the encouragement to the acquisition of property by the citizen, the aim and office of every just government. So that the first part of this section of the Constitution but emphasized an ancient right and universal principle, while the succeeding portion, so far from extending the operation of the rule to any new objects, enlarged the occasions for the invasion of private property for private

use by permitting it under circumstances of doubtful, if not denied, right at common law.

It is among the canons for the interpretation of laws that the intention of the law maker is often to be deduced from a view of the whole and every part of the instrument or act, taken and compared together. "The real intention, when accurately ascertained, will always prevail over the literal sense of the terms." It is true that a thing which is within the mind and intention of the framers of the law is as much within the statute as if it were within its letter; "and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." *People* v. *Utica Ins. Co.*, 15 Johns. 380, 381. So may the letter of the statute be enlarged or restrained according to the true intent of the framers of the law. *Whitney* v. *Whitney*, 14 Mass. 92, 93; *Riddick* v. *Governor*, 1 Mo. 147; *State* v. *Emerson*, 39 Mo. 80; *State* v. *King*, 44 Mo. 283; *Riddick* v. *Walsh*, 15 Mo. 519. This intention is to be taken or presumed according to what is consonant to reason and good discretion, and so as neither to embarrass the sovereign power of the State, nor lead to consequences unreasonable and revolutionary. *Neenan* v. *Smith*, 50 Mo. 525; *State* v. *Pitts*, 51 Mo. 133; *Conner* v. *Railroad Co.*, 59 Mo. 285. It is a well-known fact to the eminent lawyers and others composing the convention of 1875 that upon the statute books of this State were a large number of laws evincing the settled policy of the law-making power to give to persons injured damages in excess of the actual loss sustained, whenever and wherever it seemed necessary in the legislative mind to so do in the execution of the laws for the preservation of the public good and the better regulation of the police power. Among these are the following, furnished by the diligent counsel for plaintiff.

[Omitting these.]

Some of these statutes are old and historic. They are inwoven with the legislative policy of the State. They are grounded in the wisdom of experience. Their long continuance justifies the presumption that the people and their law makers have found them preservative of the public welfare, and a shield of just protection to private property. Why therefore may I ask, in respect of the constitutional provision under consideration and others invoked in this appeal, should the framers of the Constitution of 1875, representing as they did, the sovereignty of the whole people, intend by the general language employed, to sweep away all these sanctioned legisla-

tive provisions? Was there any complaint from the constituency to justify it? Any popular demand for it? Any recognized abuse or evil in their application? Is it not reasonable to assume, that had it been in the mind of the framers of the Constitution to strike so deep and broad into the body of the legislative branch of the State government, that they would have done so by the employment of words so direct and pertinent as to have made the purpose unmistakable? Other provisions of the organic act, designed to effect radical changes and eliminate existing laws from the statutes, give clear answer to these questions.

III. It is likewise contended that said section 43 is in conflict with section 53, of article 4, of the Constitution of 1875. This provision is as follows: "The general assembly shall not pass any local or special law * * * granting to any corporation, association, or individual, any special or exclusive right, privilege or immunity, or to any corporation, association, or individual the right to lay down a railroad track." It is argued that section 43 is special, that it "is partial and discriminates as between individuals and corporations." Is it just and correct to charge that this statute grants to any "individual any special or exclusive right, privilege, or immunity?" If it named an individual or preferred any particular number of citizens, and declared that they and no others might maintain the given action, it would be obnoxious to the criticism. But this right of action is given to all the people who may be thus injured. It is given as well to any association of people, and to railroad corporations whose stock may be injured by any railroad. Nor is it just or accurate to say of this statute that "it prescribes a severer punishment against a railroad corporation, owner of a railroad, than an individual owner or partnership owner." As early as 1872 (Laws of 1872, 69, § 2), it was enacted by the legislature that: "The term railroad corporation contained in this act shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in this State." This was the law when the appellant obtained its charter of incorporation under the general law of the State; and it is the law of the State to-day. R. S. 1879, § 825. It is further alleged against this statute that it is partial and special because it "is directed against railroads alone, while no other common carriers are brought within its operation." Had the legislature deemed it essential to the protection of human life and private

roperty they would doubtless have extended the statute to carriers by coach and water. But as the class of property and human life protected by this provision of the statute is not exposed to a like peril incident to coach and water travel, the occasion and necessity for so extending the statute does not exist. Class legislation is not necessarily obnoxious to the Constitution. It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all persons "who are or who may come into like situations and circumstances" is not partial. *Mayor* v. *Dearmon*, 2 Sneed, 104; *Davis* v. *State*, 3 Lea, 379; *Snyder* v. *Warford*, 11 Mo. 517. As suggested by COOPER, J., in *Davis* v. *State*, *supra*, if the construction contended for by the learned counsel should obtain, laws giving mechanics' liens would be interdicted. And we might add, so would the act giving liens to contractors, laborers, etc., against railroads, liens of agisters and keepers of horses, inn and boarding-house keepers, as also landlords' liens. This character of legislation, as already shown, has long prevailed in this State. The courts have repeatedly recognized and sanctioned their validity, until now it would be disruptive to outlaw them. This of course should not deter the courts from their duty in pronouncing the judgment demanded by a strict and rigid enforcement of the mandate of the Constitution, lead where it might. But when the judiciary is confronted with the question of the constitutionality of a solemn act of the legislative branch of the government, while not shrinking from the responsibility, it should approach its consideration with cautious deliberation. The errors and oppressions of a legislative body are more readily corrected. The people are more potential through the ballot-box to reach immediately the evil. The legislature lives for only two years. The process of rectifying the mischief of a misconstruction by the judiciary of the fundamental law is necessarily slow.

Therefore, and wisely, the courts before pronouncing a statute void, demand to be satisfied beyond a reasonable doubt of its vice. So this court has announced. "Both upon principle and authority the acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language

and subject-matter, is to be made in favor of the constitutionality of the act." *State* v. *Railroad Co.*, 48 Mo. 468; *State* v. *Able*, 65 Mo. 357. Much of the vigorous argument in this case is directed against the wisdom and policy of the law in question. Some of the strictures upon the abuses it begets in practice may be just. But as was aptly said by COOPER, J., in *Davis* v. *State*, *supra*: "Whether a statute is contrary to the genius of a free people, is a question for the legislature, not the judge. It cannot be annulled upon supposed equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import."

[Minor matters omitted.]

It follows that the judgment of the Court of Appeals should be affirmed.

Judgment affirmed.

All concur. HOUGH, C. J., absent.

NOTE BY THE REPORTER.—To same effect, *Barnet* v. *Atlantic & Pacific R. Co.* (68 Mo. 56), 30 Am. Rep. 773; *Cairo & St. L. R. Co.* (92 Ill. 97), 34 Am. Rep. 112; *Little Rock & Ft. Scott Ry. Co.* v. *Payne* (33 Ark. 816), 34 Am. Rep. 55. *Contra: Atchison & Neb. R. Co.* v. *Baty* (6 Neb. 37), 29 Am. Rep. 356.

The following is an abstract of *Missouri Pac. Ry. Co.* v. *Humes*, 115 U. S. 512, opinion by FIELD, J.: A statute of Missouri provides that every railroad corporation in the State shall erect and maintain lawful fences on the sides of its road where it passes through, along, or adjoining inclosed or cultivated fields, or uninclosed lands, with openings and gates at necessary farm crossings of the road, and also construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad, and that until fences, openings, gates and farm crossings, and cattle guards shall be made and maintained, such corporation shall be liable in double the amount of all damages done by its agents, engines or cars to horses, cattle, mules, or other animals on the road, or by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle guards. *Held*, that this statute does not, in cases where stock is killed on its road, deprive the company of property without due process of law, in allowing the owner of the stock to recover damages in excess of its value; nor does it deny to the company the equal protection of the laws. (2) The legislature of a State may fix the amount of damages beyond compensation to be awarded to a party injured by the gross negligence of a railroad company to provide suitable fences and guards of its road, or prescribe the limit within which the jury, in assessing such damages, may exercise their discretion. The additional damages are by way of punishment to the company for its negligence, and it is not a valid objec-

tion that the sufferer instead of the State receive them. (3) The mode in which fines and penalties shall be enforced, whether at the suit of a private party or at a suit of the public, and what disposition shall be made of the amounts collected, are matters of legislative discretion.

FINK v. MISSOURI FURNACE COMPANY.

(82 Mo. 276.)

Master and servant — contractor.

One who contracts with a furnace company to dig sand on its land and draw it to its furnace at a fixed price per load, there being no provision as to the manner of the performance of the work, is not a servant for whose negligence the company is liable.*

ACTION for negligent killing of plaintiff's son. The opinion states the case. The plaintiff was nonsuited, but this was reversed by the St. Louis Court of Appeals.

Henry Hitchcock, for appellant.

Klein & Fisse and *O. G. Hess,* for respondent.

NORTON, J. This suit was instituted in the Circuit Court of the city of St. Louis, to recover $5,000 statutory damages for the death of plaintiff's son, about four years old, alleged to have been occasioned by the negligence of defendant. Upon a trial had in said court, at the close of the evidence the court, at defendant's instance, instructed the jury that under the evidence plaintiff could not recover; whereupon plaintiff took a nonsuit with leave to move to set the same aside, and her motion made in that behalf being overruled, the cause was taken by writ of error to the St. Louis Court of Appeals, where the judgment of the Circuit Court was reversed and the cause remanded, and from this judgment defendant prosecutes his appeal to this court.

It appears from the record, that defendant was the owner of the lot on which the accident, resulting in the death of plaintiff's child, occurred; that the lot was located in Carondelet in the city of St. Louis, and was bounded on the north by St. Dennis street, on the

* See *Carter* v. *Berlin Mills* (58 N. H. 52), 42 Am. Rep. 573.

east by an alley, on the south by a lot belonging to one Williams, on which he had a house fronting on Seventh street, which street was on the west of defendant's lot; that said lot was about one hundred and twenty feet deep eastwardly from Seventh street and fronted on said street between seventy-five and one hundred feet; that the natural grade of the lot was such that next to the Williams lot, the ground was higher by seven or eight feet than it was at St. Dennis street, and that neither one of said streets was macadamized or curbed; that there were quite a number of houses in the vicinity of said lot which were occupied by families with a number of children; that for several years previous to the accident, a colored man, by the name of Stevenson, had been hauling sand from said lot for the use of defendant in their furnace, some distance from the lot; that the soil of said lot consisted of a layer of loam on top two or three feet in depth, underneath which was the sand that said Stevenson had been engaged in digging and hauling; that the method pursued by said Stevenson in procuring the sand was such as to cause the superincumbent soil to fall of its own weight; that this excavating or undermining had been made in a horse-shoe shape, so that the grade of the lot gradually descended from St. Dennis street until at the point where the bank was still standing the grade was about three feet below that of St. Dennis street; that the face of the bank in which the digging was being done was within six or eight feet of said Williams' fence at the southern end of the lot, and was from six to ten feet in height above the lowest point of the lot; that for two years previous to the accident the lot had not been fenced; that two or three fences had before that time been put around it but had been torn down and carried away by persons unknown; that plaintiff was a widow with four children who earned her living by washing, scrubbing and such other work as she could get, and that on the 27th of August, 1879, the day of the accident, she went to the house of said Williams whose lot adjoined the one in question on the south, as above set forth, for the purpose of washing, and took with her for the purpose of caring and looking after him her youngest son, Charles, about four years old; that on that day said Stevenson with a colored man named Jones, whom he had hired upon his own account and with whom defendant had no contract relations, so far as the record shows, were digging and hauling sand from said lot, and excavating the sand by digging into the bank at the bottom to a depth of two or three feet, making a hole in the face

of the bank of three feet in height and four or five feet in width, and causing the superincumbent soil to fall down by its weight, convenient to haul away in their wagon; that at about eleven o'clock on that day Stevenson and Jones left the lot with a load of sand and during their absence, between twelve and one o'clock, the bank which they had undermined fell, covering up plaintiff's child, so that he was dead when found.

It appears from the evidence of plaintiff that a few minutes before the accident the child, who had been with its mother and under her care inside the inclosure of the Williams fence, went out of the inclosure; that the mother saw it go out and seat itself near the outside of the fence on the bank which subsequently caved in; that she neither called nor required it to return inside the inclosure on the Williams lot.

The question lying at the threshold of the case is, was the relation which Stevenson sustained to the defendant, in the work he was engaged to do, that of a servant or independent contractor? If the relation was that of contractor, the present action is not maintainable; if on the other hand, it was that of a servant, then it is maintainable, provided the other facts in the case show that the injury was occasioned by the negligent acts of the servant, without contributory negligence on the part of plaintiff. The legal test for the determination of the question is stated by Thompson on Negligence, vol. 2, 899, § 22, as follows: "The general rule is that one who has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractor or his servants committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. The contractor must answer for his own wrongs committed in the course of the work by his servants." The principle stated in the text by this writer has been recognized and affirmed by this court in the following cases: *Hilsdorf* v. *City of St. Louis*, 45 Mo. 98, 99; *Morgan* v. *Bowman*, 22 Mo. 538; *Clark* v. *H. & St. Jo. R. Co.*, 36 Mo. 218; *Barry* v. *City of St. Louis*, 17 Mo. 121.

According to the record before us, but one witness testified in regard to the contract between defendant and the parties engaged in digging and hauling sand. This witness was Mr. Asper, the foreman of the defendant, who was introduced by plaintiff and testified that he heard the contract between Stevenson and Cushman, vice-president and manager of defendant, and upon being asked to state what the arrangement was between the men hauling sand and defendant, answered as follows: "Stevenson had a contract with the defendant to deliver sand to the furnace at fifty-five cents a load. Jones had nothing to do with the company. There was no stipulation made with Stevenson as to how he should dig the sand that I know of." It also appeared that defendant gave Stevenson permission to get the sand from the lot where the accident occurred which belonged to defendant. Besides the above there was no other evidence concerning the contract. The contract as proved, speaking for itself, only shows that defendant agreed with Stevenson, engaged in an independent employment, to haul sand for it, and to pay him for such service a stipulated price per load. No control over Stevenson in reference to the mode and manner he was to execute the work he agreed to perform was reserved in the contract, and the only witness to the contract who testified, said there was no stipulation with Stevenson as to how he should dig the sand. Applying the rule adverted to to the contract as proved, we think it follows that Stevenson was an independent contractor, representing the will of his employer only as to the result of his work, and not as to the means by which he was to accomplish it.

The case of *DeForrest* v. *Wright*, 2 Mich. 368, illustrates the principle underlying cases of this class, in which it was held that when a drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer at so much per barrel, and while engaged in the work, through the carelessness of the drayman, one of the barrels rolled against and injured a person passing on the sidewalk, the employer was not liable for such injury. This case is more analogous to the one before us than the case of *Whitney* v. *Clifford*, 46 Wis. 138; s. c., 32 Am. Rep. 703, to which we have been cited, where the liability of Clifford was made to attach to him, as the owner of the saw-mill, by reason of the fact that it was the duty as well as the contract obligation of Clifford, who had hired one Dodge to manufacture shingles for him, to keep in repair the smoke stack from which sparks had escaped and occasioned the injury sued for.

[Minor questions omitted.]

The view we have taken of the cause renders it unnecessary to consider any of the other questions presented in the argument and briefs of counsel, and leads to a reversal of the judgment of the St. Louis Court of Appeals and an affirmance of the judgment of the Circuit Court, and it is so ordered.

All concur.

Judgment affirmed.

Dooley v. City of Kansas.

(82 Mo. 444.)

Municipal corporation — taking property for pest-house.

A city has no authority to seize property outside its limits for a pest-house without consent of the owner.

TRESPASS. The opinion states the case. The plaintiff had judgment below.

Wash Adams and *R. H. Field*, for appellant.

Gage, Ladd & Small, for respondent.

Henry, J. By this suit the plaintiff seeks to recover damages from defendant for a trespass upon a tract of land owned by him without the limits of the city. In the spring and summer of 1881 the small-pox was prevailing in the City of Kansas, which had no pest-house, and the patients were sent out in charge of the city police and city physician, and placed in tents by the roadside in the river bottom east of the city. The neighbors there compelled the removal of the camp by violence, and the physician and police finally took possession of plaintiff's premises, where they remained from June until the last of August, under control of officers constituting the city board of health. The expenses of this camp were paid by the city, under ordinances authorizing it. Plaintiff obtained a judgment, from which the city has appealed.

The principal question for consideration is whether the city is liable on the above facts. It is contended by her counsel in an ingenious argument that the city was not authorized to acquire property for use as a pest-house except by purchase, and that the occu-

pancy of plaintiff's premises was *ultra vires*, and therefore the city cannot be held liable for the trespass. The argument is more specious than sound. If a city can be held liable for no act which it is not authorized to perform, then since no city charter authorizes it to perpetrate a wrong, no town or city can ever be held liable for a tort authorized by it. To the contrary are *Hunt* v. *Boonville*, 65 Mo. 620; s. c., 27 Am. Rep. 299; *Thompson* v. *Boonville*, 61 Mo. 283, and *Soulard* v. *St. Louis*, 36 Mo. 546. In the latter case the city of St. Louis proceeded to appropriate private property for street purposes without observing the mode prescribed by its charter for acquiring it. It was held to have been done "without authority of law; it was wrongful and amounted to a trespass;" and the following was announced as the law on the subject: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done by its command by its agents, in relation to a matter within the scope for which it was incorporated.

The City of Kansas by its charter is authorized "to purchase and hold property, real and personal, beyond the limits of the city, to be used for the erection of pest-houses for the reception of persons afflicted with contagious or other loathsome diseases." Instead of purchasing property for that purpose she proceeded to seize the property in question, just as the city of St. Louis took possession of the property of a citizen for street purposes, without regard to the prescribed formalities for its acquisition. The city of St. Louis was held liable as a trespasser. *Soulard* v. *City*, *supra*. We are unable to perceive a distinction in principle between an unlawful seizure under the power of condemnation and such a seizure under a power to purchase. They are but different modes of acquisition. The property taken by the City of Kansas was for a purpose sanctioned by its charter, and everything was done in accordance with the charter and ordinances except the acquisition of the land. It was a case of emergency, admitting of no delay. A pest-house was an immediate necessity. The entire population of a great city was concerned in preventing the spread of a contagious disease, and the action of the city in occupying plaintiff's premises was within the scope of one of the purposes for which the city was incorporated, although the premises were not acquired in the manner prescribed by its charter. It is impossible to distinguish this case from the previous adjudications of this court, holding cities liable for torts authorized by it. Counsel, we think,

misconceive the case of *Rowland* v. *City of Gallatin*, 75 Mo. 134; s. c., 42 Am. Rep. 395. There the street commissioner of the city of Gallatin, without any authority except the verbal direction of the mayor, entered upon plaintiff's land and dug a ditch for the purpose of constructing a highway over it, and this court held the city not liable. Certain remarks found in the opinion delivered, applicable alone to that case, are regarded by appellant's counsel as having overruled the cases above cited; although two of them, *Hunt* v. *Boonville* and *Thompson* v. *Boonville*, are approvingly cited in the opinion, and the opinion delivered in *Hunt* v. *Boonville* was written by the same judge who delivered the opinion in *Rowland* v. *City of Gallatin*.

It is contended that proof of notice of the common council, that the trespass complained of had been committed, is altogether lacking. The following instruction given by the court, predicated upon evidence adduced, we think fairly and clearly declared the law on that subject.

If the jury believe from the evidence, that the property of plaintiff described in the petition was taken possession of and used from the 17th day of June, 1881, to about the middle of August following, as a camp for the keeping and treatment of persons sick with the small-pox by persons in charge of such patients by the city physician of the city of Kansas, and that such occupation of such premises was immediately thereafter known to the city physician, the mayor and other members of the board of health, and not disapproved of by them, and that the City of Kansas, by its council and other financial officers, knowing of the existence of such small-pox camp under a pretense of authority from said city, although they may not have known the precise location of said camp, appropriated the money of the city to pay all the expense of attendants upon patients at said camp upon plaintiff's said premises, and of supplying the same with provisions and other necessaries, then the jury will find their verdict for the plaintiff.

Numerous other questions are raised in briefs of counsel, which we have not deemed it necessary to discuss in this opinion. We have given them attention, and are satisfied that the court committed no material error in the trial of the cause, and the judgment is affirmed.

Judgment affirmed.

All concur.

SPRAGUE v. ROONEY.

(82 Mo. 493.)

Contract — sale for unlawful purpose.

A contract to sell a house to one who intends to keep it as a bawdy-house is not illegal merely because the vendor knows the intention.*

SPECIFIC PERFORMANCE. The opinion states the case. Defendant had judgment below.

Jenkins, Clarke & Thomas, for appellant.

T. S. B. Slaughter and *Wash Adams,* for respondent.

HENRY, J. Pending this cause in this court, John Anthony suggested that since the appeal herein was taken, he had intermarried with appellant, and asked to be made a party plaintiff, which was granted. The suit is for the enforcement of specific performance of the following contract in writing, entered into by plaintiff, then Bessie Stevenson, and defendant:

"This article of agreement, entered into this 20th day of February, 1878, by and between Catherine of the one part and Bessie Stevenson of the second part, witnesseth, that the said Catherine has this day bargained and sold to said Bessie Stevenson for the sum of $2,500, the following real estate, lying and being in the City of Kansas, county of Jackson, State of Missouri, namely: Lot No. 11, block 3 Lykin's addition to the City of Kansas, Old Town, as the same appears on record of the recorded plat of said addition, upon the following terms and conditions, to-wit: The said Bessie Stevenson to pay the sum of $25 per month, payable monthly on the 20th day of each month, until the sum of $1,000 is thus paid; then the said Catherine Rooney to execute and deliver to said Bessie Stevenson a good and sufficient warranty deed to the same, taking the notes of the said Bessie Stevenson, secured by deed of trust on the property conveyed, for the same deferred payments. But if said Bessie Stevenson fail or refuse to make any monthly payments as herein provided until deed made, her rights under this agreement

* See note, 32 Am. Rep. 122; *Wallace* v. *Lark* (12 S. C. 576), 32 Am. Rep. 516; *Rose* v. *Mitchell* (6 Colo. 102), 45 Am. Rep. 520.

to cease, and said Catherine Rooney to be immediately entitled to the possession of said estate. In witness whereof, the parties have set their names and affixed their seals to duplicate copies hereof, one to be retained by each, the day and year aforesaid.

"MRS. CATHERINE ROONEY. [Seal]
"MISS BESSIE STEVENSON. [Seal]"

The answer set up, in substance, that the contract really made by the parties was one of lease by which the premises were let to plaintiff at $25 per month, payable monthly, but that in order to evade the statute, section 1551, which forbids the lease of a house for the purpose of being used as a brothel it was agreed between the parties that they should execute the agreement in question. A replication filed put in issue the allegations of the answer, and on a trial of the cause, the court found the issues for defendant and entered a judgment accordingly, from which this appeal was prosecuted. Plaintiff at the trial objected to any evidence in support of the allegations in the answer. Her objection was overruled, and by plaintiff's own testimony, if at all, they were established. Whether the court erred in admitting such evidence is the only question for consideration.

This is not a suit to enforce a contract for a lease of the premises. If it were, the doctrine invoked by defendant and sustained by the authorities cited by her counsel would be in point. An agreement to sell a house to one whose purpose is to keep it as a bawdy-house, although known to the vendor, is not forbidden by the statute. Defendant is endeavoring to defeat a legal and valid contract by proof that it was not the contract between the parties, but that another was, which is forbidden by law. In other words, she seeks by parol evidence to substitute an invalid parol agreement for a valid one in writing and under seal. There is certainly no public interest to be subserved by withdrawing this case from the rule which forbids the introduction of parol evidence to vary or contradict a written instrument. If the contract were for a lease, and the purpose expressed therein was that the lessee would keep a hotel, or conduct other legitimate business in the house, it might be shown by parol evidence that it was let to be used for an illegal purpose. But here is an agreement in writing, signed and sealed by the parties. Its execution is admitted; no fraud is charged to procure defendant's signature to it, but she says it was not the real agreement of the

parties, but that the agreement between them rested in parol and was a lease of the premises. In *Brua's Appeal*, 55 Penn. St. 299, cited by defendant's counsel, it was the consideration of the notes which was held open to inquiry, and having been found to be a "stock gambling transaction" the notes were held void. *Fowler* v. *Scully*, 72 Penn. St. 465, was a proceeding to foreclose a mortgage of real estate given to a national bank to secure future advances, and this appeared upon its face. But if it had not, evidence would have been admissible to show the fact. There is no analogy however between such a case and the one under consideration. Here the evidence was not offered to show that the contract sued on was an illegal contract, but to prove that it was not the contract made by the parties. If the statute forbade the sale of premises to be used by the vendee for an illegal purpose, on a suit to enforce the contract, the defendant might show the illegal purpose, although a different one was expressed in the contract. To that extent the authorities cited go, and no further.

The judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

All concur, except SHERWOOD, J., who dissents.

RINEHART v. BILLS.

(82 Mo. 534.)

Seduction — action for alienating wife's affections.

An action for alienating a wife's affections may be maintained, without proof of debauchery or enticing her away. (*See note, p.* 388.)

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

O. D. Jones, for appellant.

Dysart & Mitchell, for respondent.

MARTIN, C. On the 26th day of January, 1880, the plaintiff filed a complaint in equity against the defendant. In this complaint another party was originally included as a defendant, but was discharged before trial. The object of the suit was to enjoin

the transfer and collection of a certain promissory note in the sum of $550 made by the plaintiff, to enforce its surrender and cancellation, and obtain a judgment for a part payment indorsed upon it. It is alleged in the petition that the note was without consideration, and was obtained by false representations, by threats of suit, and of personal violence. The defendant in his answer denied the allegations of the petition and recited the facts constituting the consideration of the note, which in his own language read as follows:

"Defendant, further answering, says: That on or about the 11th day of November, 1879, he learned for the first time that plaintiff, for a long time thereto, to-wit, for about eighteen months then last past, had been making love to his (defendant's) wife, whenever and wherever he could meet her. That he had plied every art and used every device in his power to win her love and esteem, and to alienate and estrange her from her husband. That he told her at divers times and places that he loved her deeply, devotedly, madly, and that he could not live without her. That plaintiff had written her love-letters on divers occasions; had given her a fine gold finger-ring, and desired to leave and abandon his own wife and children, and take defendant's wife and go to a new country where they would not be known, and could marry and live together as man and wife. That plaintiff was rich and would maintain her in luxury and ease, and she could live like a lady without labor and toil. Defendant, further answering states that plaintiff, by his persistent efforts, finally succeeded in alienating and estranging the love and affections of defendant's wife from defendant, and procured in the manner and by the means aforesaid her consent to leave and desert her husband and elope with plaintiff."

The answer goes on to recite that she had relented her rash promise to elope with plaintiff, had confessed everything to her husband, and begged to remain with him as his wife under the security of pardon and forgiveness. It is further alleged in substance that the defendant, smarting under the wrongs inflicted upon him by plaintiff, repaired to the plaintiff's residence with his attorney, with a view of settling for these wrongs without suit; that in the interview the plaintiff admitted the facts as charged against him, and agreed to pay defendant in liquidation of all damages by him sustained, and in final settlement thereof, the sum of $600; that he paid down $50 and gave the note in controversy for the remaining $550, payable four months from date; that he afterward paid $205

on account of the note, which payment was indorsed on the same. The answer concludes with a prayer that the injunction be dissolved and judgment be rendered in defendant's favor, in the amount of the note remaining unpaid, which is stated to be $345 with interest.

The plaintiff interposed a demurrer to this answer, which was overruled. The case was then tried by the court without the intervention of a jury. The court found the issues in favor of defendant, declaring in its decree that the matters and allegations in plaintiff's petition are untrue and not sustained by the evidence. The injunction was dissolved, and the sum of $40.05 was assessed as damages on the injunction bond against the plaintiff and his sureties. It was also adjudged that the defendant recover of plaintiff the balance due on the note sought to be enjoined. The bill of exceptions does not contain the evidence, but merely recites that evidence was submitted by both parties tending to prove the allegations of their pleadings.

Only one question is presented to us in the record for determination. That question involves the sufficiency of the defense, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him for which an action lies, and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained upon either principle or authority. The injury to defendant consists in the alienation of his wife's affections with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable repentance. The alienation of the wife's affections for which the law gives redress may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury from which an elopement might well be accepted in the nature of an alleviation. Schouler Dom. Rel. 57; Cooley Torts, 224; *Hoard* v. *Peck*, 56 Barb. 202; *Heermance* v. *James*, 47 Barb. 120.

I think it would be difficult to regard it in any other light in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It also admits the fact of actual estrangement and alienation which constitutes the essence of the offense. Every thing which follows afterward can be only in the nature of aggravation, mitigation or reparation of the wrong inflicted upon the sanctity of the defendant's home.

I may add here, by way of allusion to the consideration of the note, that the compromise of a doubtful claim asserted in good faith furnishes a valuable consideration to support a promise. 1 Pars. Cont. 438, § 4, (6th ed.).

The judgment is affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—The case of *Hoard* v. *Peck*, cited in the opinion above, is *sui generis*, and probably will always remain so. It was there held that a husband may maintain an action against an apothecary, who, without the husband's knowledge, habitually sells laudanum to the wife, knowing that she uses it to the impairment of her mind and body. It would seem that if this were law there would be no need of the civil damage acts, which grant a similar redress to the wife against those who sell intoxicating liquors to the husband.

In *Heermance* v. *James*, cited in the above opinion, the court said:

"Separation is the usual consequence of such interference, and the cases found in the books are cases of actual separation from the house and home of the husband. And it is insisted upon the argument that an allegation of pecuniary loss, or of loss of service by an actual leaving or continuing away from service, is necessary to show a cause of action.

"I do not think this argument is sound. The gist of the action is the loss of the comfort and society of the wife. * * * The case before us differs from the cases cited, not in principle, but only in the fact that there was no actual departure of the wife from the husband's house. But how does this fact change the case or the principle to be determined by it? The injury in either case is the same. I am not sure that it is not aggravated by her remaining. Here was the same poisoning of the mind, the same alienating of her affections, the same refusal to receive him as her husband, and to live with him as such; the same refusal of her comfort, fellowship, society, and of her aid and assistance in his domestic affairs; all that constitutes the gist of the action, all equally induced by the unlawful act of advice of the defendant. Her actual presence with him under such circumstances, maintaining toward him such feeling, could afford him no relief, but would rather add the provocation of insult to the keenness of the injury inflicted; it would continue a present, living, irritating, aggravating, if not consuming source of grief,

which her absence might in a measure relieve. At all events, it would relieve him from the burden of her support. It is laid down by Bishop in his work on Marriage and Divorce, §§ 781, 782, 797, 799, that the refusal of the husband or wife to dwell with the other party to the marriage as husband or wife, is desertion; and the same authorities hold that there may be a desertion though the parties continue to occupy the same house. 1 Bish. Marr. and Div., § 779; 2 Litt. 337; *Moss* v. *Moss*, 2 Ired. 35.

"How is desertion then to be distinguished from separation? What reason is there that requires a technical, physical separation to constitute a cause of action? I apprehend that the separation which occasions the injury, the suffering, the loss, is based upon a higher principle than this; it strikes at the highest enjoyment of life; it is alienated affections; it is the loss of comfort, fellowship and society; it is the loss of aid and assistance in domestic affairs; the loss of conjugal rights. 'It may,' says Bishop, 'be laid down as a rule, that if one party refuse to the other whatever belongs in marriage alone, from causes resting in the will, and not from physical inability, the refusing party would thereby voluntarily withdraw from whatever the relation of marriage, distinguished from any other relation existing between human beings, is understood to imply. Therefore he should be holden to desert thereby the other.' § 782. Let the law be administered in all its fidelity and integrity, but let it not be made the subject of reproach, that he who admits the infliction of the injury in this case may escape its penalties upon a mere frivolous and immaterial technicality."

In *Southwick* v. *Southwick*, 97 Mass. 327, it was held that a continued denial by the wife of the husband privilege of sexual intercourse was not desertion.

STATE v. MYERS.

(82 Mo. 558.)

Criminal law — cheating — other offenses.

On a trial for obtaining property by trick and fraud, proof of other similar acts by the defendaat, on the same day and at the same town, is admissible to show intent.*

CONVICTION of obtaining property by trick and fraud. The opinion states the case.

A. L. Thomas, for appellant.

D. H. McIntyre, attorney-general, for State.

*See *Strong* v. *State* (86 Ind. 208), 44 Am. Rep. 292, and note, 299; *Reg.* v. *Cooper*, 1 Q. B. Div. 19; *Reg.* v. *Holt*, 8 Cox C. C. 411.

PHILLIPS, C. The defendant was indicted under section 1561, Revised Statutes 1879, for an attempt by trick and fraud to obtain from one P. K. Beard the sum of $1, the property of said Beard. He was found guilty and sentenced to a term of two years in the penitentiary. From that judgment he prosecutes this appeal.

[Minor point omitted.]

The action of the trial court in admitting certain evidence is assigned for error. To properly understand this issue it is important to explain the nature of the "trick" by which the defendant is charged to have attempted to obtain money from Beard. Beard's testimony was, that the defendant came into the store and asked for a nickel's worth of tobacco. It was handed to him, and in payment he handed Beard a two-dollar bill. Beard returned him a silver dollar and ninety-five cents in change. Defendant dropped the dollar in silver in his pocket, and said he had found a nickel, and laying it on the counter with the ninety-five cents, said he would rather have a dollar piece for it. Thereupon Beard took from the drawer a silver dollar and laid it down. Whereat the defendant remarked that he believed he would rather have the two dollar bill than the silver, and requested Beard to give it to him and take the two dollars in silver on the counter. Whereat Beard reminded him that he had put the dollar in his pocket, and to hand him that. The prisoner then took up his dollar in change and walked out. The prosecuting attorney then introduced other witnesses, by whom he proved, against the objection of defendant, that on the same day near the same time, both before and after the act in question, in the same village, the defendant attempted the same trick on other clerks, and was heard to say to his companion that he had "knocked them down for a one" — alluding to a house which he had just left, and further stated that "my partner has done the town for $10, and we are getting drunk on the money, or over it." The prosecuting attorney stated at the time, that this evidence was introduced for the purpose of showing the intent with which the act under investigation was done.

As this presents an important question in the administration of criminal law, about which there is some contrariety of opinion, I have given it much consideration and investigation. It is a general rule that a distinct crime, for which the party might be separately proceeded against, cannot be given in evidence against the prisoner on trial for a single offense. It rests upon the equitable and humane

principle that it is unjust to raise a presumption of guilt against the prisoner, on the idea that having committed one offense the moral obliquity or depravity it exhibits makes it probable he would commit another. And as it is difficult to guard against the blunder of the average jury in failing to distinguish the real purpose for which such evidence is admitted, as against the bad impression it would likely make on them as to the prisoner's general character, it is contended that it would be safer to exclude it under all circumstances. But the rule has its exceptions, now too deeply and firmly settled not to recognize them. They are exceptions founded in as much wisdom and justice as the rule itself. The most generally recognized exception is to admit other similar acts for the purpose of proving the guilty knowledge of the prisoner in cases of indictments for uttering, or having in his possession false notes, bills of exchange, bank bills, instruments for forging the same and counterfeit coin, and recent possession of stolen property. 1 Lead. Cr. Cases, 189; Ros. Cr. Ev. 90; *Com.* v. *Coe*, 115 Mass. 481; *Heard* v. *State*, 9 Texas App. 1. The exception also extends to admitting other like acts as proof of the *scienter* in obtaining money under false pretenses, as in the instance of falsely representing the bill of an insolvent bank to be good whereby the prisoner fraudulently obtained property. *Com.* v. *Stone*, 4 Metc. 43, 47. So on an indictment for knowingly delivering skimmed milk to a factory, to be manufactured into cheese, with intent to defraud, evidence of transactions of the same character, other than that named in the indictment, has been admitted for the purpose of showing guilty knowledge. *Bainbridge* v. *State*, 30 Ohio St. 265. In a comparatively recent case (*Queen* v. *Francis*, L. R., 2 C. C. Res. 128; 12 Cox C. C. 612), the prisoner obtained money by pretending that a certain ring contained diamonds, when in fact it was composed only of crystals. To sustain the charge of criminal fraud, evidence was given by the crown that on a prior occasion the prisoner obtained money by falsely representing that a chain only coated with gold was made of pure gold. Lord COLERIDGE, C. J., who delivered the judgment, said: "It seems clear on principle that when the act charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

Upon the same reason and by equal authority is the proposition maintainable that the exception to the general rule extends to admitting such proof where the question of intent, the *quo animo*, is material to be established. It stands almost on the same ground as proof of the *scienter*. The English authorities are quite decided in admitting the proof of the character in question. In *Queen* v. *Dossett*, 2 Cox C. C. 243, the prisoner was indicted for setting fire to a rick. It was fired by the prisoner discharging a gun near it. The prosecution offered evidence to the effect that on the day preceding the rick was on fire, and the prisoner was then near it with his gun in hand. MAULE, J., said: "The mere fact of the evidence going to prove another felony is not sufficient to exclude it if in itself it be good evidence. It is only by the conduct of the prisoner that a judgment can be formed whether the act was accidental or intentional. It is not as evidence of a felony, but as evidence of prisoner's intentions, that it may be received." In *Rex* v. *Voke*, 1 Rus. & Ry. 531, the prisoner was indicted for maliciously shooting another. The state of the proof being such as to raise some doubt whether the shooting was intentional or accidental, evidence was admitted of a previous attempt on the same day by the prisoner to shoot the party. In *Reg.* v. *Richardson*, 2 F. & F. 343, the prisoner was indicted for embezzlement. The prisoner in rendering account to his employer made it exceed the sum of his actual expenditures from one to three pounds. For the purpose of showing that the act for which he was indicted was not a mistake, the prosecution introduced evidence of instances both before and after the act in question of similar returns. It was held by all the judges, after the fullest consideration, to be competent. In *Rex* v. *Hogg*, 4 C. & P. 364; 19 Eng. C. L. 420, the prisoner was indicted for administering sulphuric acid to horses with intent to kill them. Evidence that the prisoner had hitherto mixed acid with the horses' corn was admitted by PARKE, J., "as showing whether the act was done with the intent charged in the indictment." In *Rex* v. *Winkworth*, 4 C. & P. 444; 19 E. C. L. 465, the prisoners came with a mob to prosecutor's house, and one of the mob went up to him and very civilly advised him that he would better give the mob something to get rid of them, which he did. For the purpose of showing that this was not disinterested and honest advice the prosecutor introduced evidence that this mob at other houses demanded money on the same day while the prisoners or some of

them were with them. The competency of it was affirmed by such judges as PARK, VAUGHN, ALDERSON and Lord TENTERDEN. In *Regina* v. *Garner*, 3 F. & F. 681, on the trial of the husband and wife for the murder of his mother by poison, evidence was admitted to show that the former wife of the prisoner died in the same way, "with a view to enable the jury to determine as to whether such was accidental or not." See 1 Greenl. Ev. 53; 3 Russ. Cr., §§ 285, 288; Ros. Cr. Ev. 86, 89.

The American authorities are, if any thing, more pronounced in favor of the competency of this evidence. *Bottomley* v. *United States*, 1 Story, 135, was a proceeding by information on a libel of seizure of goods imported and concealed in fraud of the impost laws. The government on the trial introduced evidence of former similar acts of the libellee to show the criminal intent of the act in question. STORY, J., held the proof competent *inter alia* "to repel the suggestion that the act might be fairly attributable to accident, mistake, or innocent rashness, or negligence." *Arguendo*, he said: "In all cases where the guilt of the party depends upon the intent, purpose or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part for the purpose of establishing such guilty intent, design, purpose or knowledge." This question came again before this same learned judge, when on the supreme bench of the United States in the case of *Wood* v. *United States*, 16 Pet. 342, which was a proceeding similar to the case just cited. For the purpose of showing the fraudulent intent of the libellee the government introduced evidence of other fraudulent invoices, etc. STORY, J., in delivering the opinion, said: "The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive, in the particular act directly in judgment. Indeed in no other way would it be practicable, in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. They constitute exceptions to the general rule, excluding evidence not directly compre-

hended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the points in issue, is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive." After stating the exception in favor of the admission of such evidence in proof of guilty knowledge in cases of forgery, uttering false notes and passing counterfeit money, etc., he adds: "Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud being essentially a matter of motive and intention, is often deducible from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy."

In *Osborne* v. *People*, 2 Park. 583, this rule was recognized and applied. The court say: "The acts of the prisoner while in the store rendered it somewhat doubtful whether the entry was a burglary or a trespass, hence the necessity of the proof to show the intent." And in *People* v. *Wood*, 3 Park. 681, evidence of prior offenses, of a similar character, more or less connected with that on trial, was admitted, not for the purpose of proving the act under investigation, but "distinctly and solely for the purpose of establishing the *quo animo*, the motive existing in the mind of the prisoner," in committing the act for which he was indicted. In *Com.* v. *Turner*, 3 Metc. 19, this question is ably considered by the Supreme Court of Massachusetts. Turner was indicted jointly with one Shearer for kidnapping a negro boy in Massachusetts and running him off to Virginia. For the purpose of showing that Turner was acting with a guilty intent in connection with Shearer, the prosecution introduced evidence to the effect that on the morning of the same day of the alleged abduction Turner was in company with Shearer, inquiring after another colored boy, and also, that on the previous day Turner endeavored to procure a colored boy from the overseer of the poor at the alms-house under false pretenses. After stating the general rule, and the exception in admitting such proof to establish the *scienter* when material, DEWY, J., says: "Evidence of other facts than those connected immediately with the act charged are always admissible, where the intent of the defendant forms a material part of the issue, and where those facts can be supposed to have any proper tendency to establish the intent. * * *

The intent and purpose of the defendant, in obtaining the possession and custody of the individual alleged to be unlawfully taken, were to be inferred from circumstances, and necessarily opened a wide door for the introduction of evidence of the acts of the party accused, having any reasonable degree of connection with the particular act complained of. It was with the view of fixing the character of the last act, that evidence was received of the conduct and declarations of the defendant on the day previous, and at another place, and in reference to another individual. * * * With reference to such purpose, and thus limited, it seems to us to have been properly admitted."

It would be difficult to find in a like discussion a case more parallel in its facts and principles than that of *Trogden* v. *Commonwealth*, 31 Gratt. 862, in which this matter is reviewed most thoroughly by that eminent jurist, STAPLES, J. The prisoner was indicted for obtaining goods from M.& Co. upon false pretenses. On the trial the Commonwealth introduced evidence, to the effect, that the accused, in the same city and at or about the same time, purchased goods from other parties upon like false pretenses, for the purposes of showing the intent of the accused in making the representations to M. & Co. It was held admissible for this purpose; and the decision is placed throughout upon the ground that the evidence bore upon the question of the fraudulent intent with which the act was done. The authorities are collected and reviewed with a master's hand; and they sustain the proposition contended for beyond any reasonable controversy.

In answer to the suggestion of the counsel for the prisoner, that when the prisoner did the act in question, as it was proved he did, the jury must infer the intent from the act; and therefore evidence of collateral facts is unnecessary and irrelevant, and calculated to mislead the jury, the court say: "It may be conceded that when goods are obtained by false representations, the jury may justly infer the fraudulent intent. But it frequently happens in a large majority of cases, there are numerous facts and circumstances, sometimes of a minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions of the accused to show the guilty intent, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? What would be

thought of a judge who would thus prejudice the case and invade the province of the jury? The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts.

* * * We are asked to say that the evidence set out in the bill of exceptions is irrelevant, upon the assumption that without it the jury must have found the guilty intent on the part of the accused." This and its cognates are fully sustained by the following cases: *Friend* v. *Hamill*, 34 Md. 298; *Cary* v. *Hotailing*, 1 Hill, 311, 316; *Phillips* v. *People*, 57 Barb. 354; *Rowley* v. *Bigelow*, 12 Pick. 311; *Com.* v. *Eastman*, 1 Cush. 189; *Com.* v. *Tuckerman*, 10 Gray, 173; *McKenney* v. *Dingley*, 4 Greenl. 172; *Bielschofsky* v. *People*, 3 Hun, 40, affirmed 60 N. Y. 616; *Miller* v. *Barber*, 66 N. Y. 559.

It has been suggested that this doctrine is opposed by so great a jurist as Judge AGNEW in the case of *Shaffner* v. *Commonwealth*, 72 Penn. St. 60; s. c., 13 Am. Rep. 649. In the course of that opinion he says: "To make one criminal act evidence of another, a connection must have existed between them in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other." The case was one which did not render such evidence material in ascertaining the intent of the party accused.

Hence it is to be observed that he treats the question as if the attempt was made by the *nisi* court "to make one criminal act evidence of another." In such case, there can be no question but there should be such a connection between the two acts or offenses as to link them together in the mind of the actors, so as to make one follow the other as a means to an end. This was the state of the case in *State* v. *Greenwade*, 72 Mo. 298. The limitation of the rule as applied by AGNEW, J., *supra*, was proper, because there was no question, essentially, of guilty knowledge or intent; for as it is said in the statement of the case: "The evidence tended to show that she died by poison, and the principal question was whether the poison had been administered by the defendant."

In the case at bar the very gist of the offense charged is the criminal intent with which the act was done, and the burden of proof rests upon the State. *Anable's* case, 24 Gratt. 563, 570. It must be shown affirmatively that the defendant's purpose was to defraud. Such intent is not a presumption of law, but is a fact

to be found by the jury. *Trogden's* case, *supra.* It has been held by the highest authority in this class of cases, that even the admission of the accused that the act was done with the criminal intent cannot preclude the State from proving it by any other competent testimony, for the jury are the sole judges of the evidence. *Com.* v. *McCarthy*, 119 Mass. 354; *Priest* v. *Groton*, 103 Mass. 530. Under the facts of this case it was for the jury to say whether the act of the prisoner was a criminal act, done with a fraudulent intent to obtain the money of the clerk, or whether it was a mistake of effort merely to practice upon him a joke. The jury, without violence to reason, under an instruction to give the prisoner the benefit of every reasonable doubt, have convicted him. The prosecuting attorney, as suggested by STAPLES, J., *supra*, and by Roscoe in his Criminal Evidence 91, had the right to anticipate an obvious defense of the prisoner that it was a mistake or without criminal intent, and put in, in the first instance, all his evidence bearing on the issue. The evidence further showed that the prisoner started out on that day with the perpetration of the several acts linked together in his mind. His purpose was to employ his own vulgar but suggestive terms "to do the town." He did "beat" the unwary out of $10 by the same attempted "trick."

We think, both on reason and authority, the evidence complained of was admissible under the circumstances of this case. The other acts were so recent and so allied in character and purpose to the one on trial that they were quite essential to enable the jury to reach a conclusion, just alike to the people and the accused. It was offered with the distinct statement by the prosecuting attorney that it was for the purpose of showing the defendant's intention in the attempt upon young Beard. With this limitation on its scope it was properly admitted.

It follows that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

All concur.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

WHITNEY v. CHAMBERS.

(17 Neb. 70.)

Statute of limitations — payment by assignee.

The payment of a dividend by the assignee of an insolvent debtor will not take the debt out of the statute of limitations as against the debtor. (*See note, p.* 401.)

ACTION on promissory notes. The opinion states the case. The defendant had judgment below.

J. H. Smith, for plaintiff in error.

Austin J. Rittenhouse, for defendant in error.

COBB, C. J. There is but one question presented by the record in this case. The action in the court below was brought on two several promissory notes, one of which became due sixty and the other ninety days after January 25, 1877. The action was brought on October 7, 1882; so that upon their face the notes were barred by the statute, full five years having elapsed after the maturity of the notes when the action was brought. But upon the back of each of said notes, appear two indorsements, one of $34.50, April 20, 1878, the other of $6.90, October 9 of the same year, which in-

dorsements were alleged in the petition to have been made for money paid on the said notes by the duly appointed and acting assignee of the defendant by virtue of his power and duties as assignee. There is also attached to the said petition and made a part thereof a copy of a deed of assignment from the defendant to one Delevan Bates, of a certain stock of goods, village lot, etc., for the benefit of his, the said defendant's creditors, a list of whom were therein given, including plaintiffs and the payees of the said notes.

There was also contained in said petition a third cause of action, consisting of a book account, the last item of which was dated September 20, 1877, and which contains two credits of cash from said assignee, of dates respectively April 20 and October 9, 1878. The defendant filed a general demurrer to the petition, which was sustained by the court, and this is the sole error upon which the cause is brought to this court.

Section 22 of our Code provides that "in any cause founded on contract, when any part of the principal or interest shall have been paid * * * an action may be brought in such case within the period prescribed for the same after such payment." So the question presented for our determination is whether a part payment made by an assignee of the debtor, under the power of a general assignment for the benefit of creditors, will have the same effect under this section as a payment made by the debtor himself.

Under a statute like our own the Supreme Court of Ohio, in the case of *Marienthal* v. *Mosier*, 16 Ohio St. 566, held that the payment of a dividend by the assignee of a debtor did not take the residue out of the statute of limitations. The opinion cites the cases of *Stoddard* v. *Doane*, 7 Gray, 387; *Pickett* v. *Leonard*, 34 Barb. 193, and *Roosevelt* v. *Marks*, 6 Johns. Ch. 266. While it cannot be said that the argument is all on the side of the above cases, and there are high authorities holding the other way, yet I think that the weight of reason as well as of authority is with them.

Counsel for plaintiff in error cite with evident confidence the case of *Sornberger* v. *Lee*, 14 Neb. 193; s. c., 45 Am. Rep. 106. In that case the court held that "the receipt and indorsement on a promissory note, by the holder, of money realized from a collateral left with him by the maker for that purpose, will remove the bar of the statute." But the chief contention on the part of the

plaintiff in error in that case was the "mere payment of a part of a debt was not sufficient to stop the running of the statute." The court held that it was sufficient, and that the facts in that case as set out in the petition (the case having been disposed of in the court below on demurrer to the petition) as follows: "That on the 30th day of January, 1877, the plaintiffs collected $61.55 on a note which defendant had left with them as collateral security to the note above described, and on the same day made the indorsement as above set forth," were sufficient to constitute a part payment under the statute.

As I understand the reasoning of the cases upon the section of the statute under consideration, it amounts to about this, that a part payment in order to bar the statute must be equivalent to an acknowledgment of an existing liability or to a promise to pay the same. If such is the logic of the statute, then I think there is a wide difference between the part payment in the above case and that in the case at bar. There the application was made pursuant to the present special authority of the debtor, by an agent appointed for that purpose. Any thing else which the agent was authorized to do, to-wit, to collect the money on the collateral, was a mere incident to the application of it on the note. Here the application of any portion of the property to the part payment of the notes and account sued on was not necessarily or probably in the mind of the defendant in error when he made the assignment for the benefit of his creditors. The main object of the defendant in error in making the assignment was to place the legal title and possession of the assigned property in his assignee, to the end that it might be fairly and equally distributed among his creditors, in proportion to their respective demands, and any payment on the notes and account of the plaintiffs in error was a mere incident to said assignment and the trust thereby created. And as it appears to me, the payments made by said assignee on the said notes and account were made as the agent of the law and of the said creditors rather than as the agent of the said assignor.

For all that appears on the face of the deed of assignment attached as an exhibit to the petition in the case at bar, it was not in the mind of the assignor when he made the assignment that the property would pay less than the whole of the demands of his creditors named in the schedule, so that it cannot be said that he contemplated the making of part payment on the notes or account sued on.

Since writing the above my attention has been called to the case of *Leison* v. *Kenyon*, 31 Kans. 301, cited by counsel for plaintiff in error from the Pacific Reporter, which work not being in the library, the case was not sooner examined. While that able court came to a different conclusion, I do not see sufficient reason in their opinion to reconsider the views above expressed.

I therefore reach the conclusion that there was no error in sustaining the demurrer to the petition. The judgment of the District Court is affirmed.

Judgment affirmed.

The other judges concur.

NOTE BY THE REPORTER.— In *Leiton* v. *Kenyon*, 31 Kans. 301, BREWER, J., said: "We have a statute regulating assignments for the benefit of creditors, and the proceedings under this assignment were had in conformity to the provisions of such statute. But for such payment, the notes were outlawed. Were such payments sufficient to avoid the bar of the statute? The statute (Code, § 24) provides that: 'When any part of the principal or interest shall have been paid, * * * an action may be brought in such case within the period prescribed for the same after such payment.' Whatever may be the rules elsewhere, this statute controls the matter in this State. Here, statutes of limitation are held to be statutes of repose. *Taylor* v. *Miles*, 5 Kans. 499; *Elder* v. *Dyer*, 26 Kans. 604. Partial payments made by one debtor will not suspend the running of the statute in favor of other debtors on the same obligation. *Steele* v. *Souder*, 20 Kans. 39. But here the party sought to be charged is the one for whom and out of whose property the payment was made. It was made in pursuance of an express direction. So upon the maxim *qui facit per alium, facit per se*, it would seem that this payment was within the very letter of said section 24.

"It is true this payment was not made at the time the authority to pay was given; but the statute makes the payment itself, and not any prior authorization or act, the date from which the limitation commences. Suppose, for instance, the debtor should send money by a friend with instructions to pay it upon his note, and in consequence of the distance which the money had to be carried, or the absence of the creditor from his ordinary place of busines, or for any other reason, the payment was not in fact made for days or weeks after the money had left the debtor's hands; the statute would date from the time the creditor received, and not from the time the debtor parted with it. The same rule holds good where the debtor intrusts to an agent any personal or real property with express instructions to sell and apply the proceeds in payment of that debt. The statute would then date from the time the agent executed his trust and handed the money to the creditor, and not from the time the debtor gave authority to his agent. Now that is precisely this case. The debtor placed property in the hands of an assignee, with instructions to sell the property and apply the proceeds in payment of these among other debts. He did so sell and

pay. That payment was the act of the debtor, for his benefit, and out of his property.

"It seems to us there would be no question but for the existence of the statute concerning assignments for the benefit of creditors. That statue regulates all proceedings under such assignments; prescribes the duties of the assignee, and by placing his proceedings under control of the District Court makes them at least *quasi* judicial. In consequence of this, it has been held that the statute, instead of the terms of the assignment, controls the acts of the assignee; that he is not technically the agent of the assignor, but the statutory trustee for both debtor and creditors. His acts in payment are not the acts of the debtor nor his agent. He represents the law in distributing the proceeds of trust property placed in his hands. In support of this, the cases of *Marienthal* v. *Mosler*, 16 Ohio St. 566; *Stoddard* v. *Doane*, 7 Gray, 387; *Picket* v. *Leonard*, 34 Barb. 193; *Roosevelt* v. *Mark*, 6 Johns. Ch. 266, are cited. These authorities seem to be in point, and to sustain the proposition. The argument in support thereof is very fully stated in the case of 16 Ohio St., *supra*. It is not satisfactory to us. The assignment is the voluntary act of the assignor. The manner in which it is to be carried into effect may be prescribed by statute. But does that make the acts of the assignee done under the assignment, in the manner prescribed, any the less done by direction of the assignor? He may or may not assign. If he does, he in effect says to the assignee: Do these things in the time and way named. He practically adopts the statute as a part of his direction to his assignee. The existence of an assignee, and his power to take any action, depends in the first instance on the will of the assignor. Statutes often control the form of deeds and acknowledgments, the manner and methods of many proceedings, and when a party makes a deed, or resorts to any of these proceedings, he must follow the forms and methods prescribed. But still what is done is his act. Take the case at bar: The law concerning procedure under voluntary assignments was in force. The debtor makes an assignment. What is that but saying to the assignee: 'Take possession and dispose of my property in the manner prescribed by that statute'? Can he now say that he did not direct what should be done? More than that, the act of the assignee was not only in harmony with the provisions of the statute, but in obedience to the express direction of the assignor. In a double sense therefore it was his act. It must be remembered that this was not an involuntary proceeding on the part of the debtor, and that the property was not taken by legal process, and against his will, for the satisfaction of his debts. We think therefore notwithstanding these opposing authorities, that when a debtor chooses to make an assignment, and when in such assignment he makes an express direction to his assignee to sell the property assigned, and apply the same in payment of certain scheduled debts, and the assignee does as directed, payments so made are payments by the debtor within the meaning of said section 24. See *Jackson* v. *Fairbanks*, 2 H. Bl. 340; *Barger* v. *Durvin*, 22 Barb. 63."

"VALENTINE, J., said, "I concur in the decision of this case, for if it be conceded that a part payment of a debt can be made by an agent of the debtor so as to bind the debtor within the meaning of the provisions of section 24 of the Civil Code — and I think that such must be conceded — then it necessarily

follows that the part payment made in the present case, which was made by the agent of the debtor, is binding upon the debtor so as to take the case out of the statute of limitations. In such a case the statute must govern; for where a statute is applicable, it has greater force and weight as authority than the decision of any court made in some other case, and especially a decision made in some other State. In the present case, the debtor appointed the agent to make the payment, designated the debt to be paid, designated the property out of which the debt should be paid, and the payment was in fact made before the debt had been barred by any statute of limitations. In the present case however the debtor's agent was also his assignee, to whom he had assigned his property for the benefit of his creditors. But by being an assignee, I do not think that he was any the less an agent. If however this agent had been removed from his position as assignee, and some other person appointed under the assignment act to take his place as assignee, then as to whether this other person would be such an agent of the debtor that he could make a part payment of the debt that would be binding upon the debtor, within the meaning of said section 24 of the Civil Code, it is not necessary to express any opinion. Neither is it necessary to express any opinion as to whether such a part payment could be made of a debt which the debtor himself had not ordered to be paid, or out of property which the debtor had not appropriated for the payment of the same. Nor is it necessary to express any opinion as to whether the payment would be binding upon the debtor, if before the debt had become barred by the statute of limitations, he had made the order for its payment, but the payment was not in fact made till afterward. I express an opinion only upon the facts of this case, and upon them I think the judgment of the court below was correct, and should be affirmed."

HORTON, C. J., dissented.

In *Pickett* v. *Leonard*, 34 N. Y. 175, HUNT, J., said: "These cases last cited and the reasonings upon them afford a safe ground of decision in the present case. They proceed upon the basis that it would be unreasonable to construe payments by those who are not parties to the contract, nor under any personal obligation in respect to them, but are appointed to execute specific duties as evidence of a willingness and intention by the original debtor to pay the entire debt; that it would be a perversion of the intention of the parties to make the simple execution of the trust by the assignees the ground of a new assumption of the debt by the debtor.

"A voluntary assignment, like an assignment in bankruptcy or under the insolvent laws, is made for a single specific purpose by means of the property assigned to pay the debts to which it is appropriated. It has no other object or intent, near or remote, and no other idea can be honestly entertained by the parties. Even for this the assignee can hardly be deemed the agent of the assignor, but certainly not beyond it. I do not see that he is in any respect more the agent of the assignor than is an assignee in bankruptcy or insolvency. The one is nominated by the debtor alone, the other by the debtor and the creditors; but the mode of appointment does not decide the question of power or agency. He is neither authorized to speak or act for the assignor, nor is the wish or direction of that party one which he is bound or would be

justified in obeying. His duty is pointed out by law, and he cannot protect himself in any deviation from it by the instructions of the party. *Dunham* v. *Waterman*, 17 N. Y. 9–18.

"Reduced to words, the argument of the appellant is this: The assignor places his property in the hands of the assignee for the purpose of paying his debts, or a portion of them. The assignee, from the proceeds of the property, pays a creditor a fraction of his debt, and says to him, in words: 'My assignor is willing to pay the residue of your debt, and on his behalf I promise you that he will do so.' The assignor might well answer: '*Non in hæc fœdera veni*.' I have given no such authority and made no such contract. Can he, by implication and indirection, make that promise or give that assurance which he cannot do directly?

"The acts of the assignee are beyond the control of the assignor. The assignor is not at liberty to accompany a payment by the assignee with a qualification or disclaimer, as when made by himself. Such payments are made without his knowledge or assent. In his own action he may make an express disclaimer of an intention to make a further promise, and limit the effect of the payment to the payment itself, while on the theory presented, the act of his alleged agent is much more comprehensive, and necessarily carries with it a future obligation. He has no power or opportunity to disclaim, and it would be fruitless to attempt it.

"The cases show that a partner has no authority to make such promise to bind his copartner; that a joint debtor cannot bind his co-debtor, a principal his surety, unless payment is made by request of the surety, nor an assignee appointed in legal proceedings, the original debtor and all, upon the idea that there is a want of authority to create the obligation. I think it would be a departure from these established principles, as well as from good sense, to hold that such authority was given by the voluntary assignment now under consideration. The position is sustained by no authority except the Special Term decision of *Barger* v. *Durvin*, 22 Barb. 68, which I do not think was correctly decided."

STATE V. NEBRASKA TELEPHONE COMPANY.

(17 Neb. 126.)

Telegraphs — telephone company — duty to serve all.

A telephone company may not arbitrarily refuse its facilities to any person desiring them and offering compliance with its regulations, and *mandamus* will issue to compel the company to do its duty.*

MANDAMUS. The opinion states the case.

* See *Am. Rapid Tel. Co.* v. *Conn. Teleph. Co.* (49 Conn. 352), 44 Am. Rep. 237, and note, 241.

J. R. Webster, for relator.

Thurston & Hall, for respondent.

REESE, J. This is an original application for a *mandamus*, to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice.

It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterward the relator applied to the agent of the respondent and requested to become a subscriber and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist.

We cannot see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney at law in Lincoln, Nebraska; that he is somewhat extensively engaged

in the business of his profession, which extends to Lincoln and Omaha and surrounding cities and county seats, including quite a number of the principal towns in south-eastern Nebraska; that this territory is occupied by respondent exclusively, together with a large portion of south-western Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day make the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity — patented as it is — should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be sup-

plied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone. The value of such property is of course conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations, in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations; that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone by the necessities of commerce and public use has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other

public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone, "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances." *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 9.

In *State* v. *Bell Telephone Company*, 36 Ohio St. 296; s. c., 38 Am. Rep. 583, a writ of mandamus was granted by the Supreme Court of Ohio to compel the telephone company to place one of its telephone instruments in the place of business of the relator, and to give it equal facilities with other telegraph companies. The decision was based upon the statute of that State, which provided that telegraph companies should receive dispatches from and for other telegraph companies' lines, and from and for individuals, and transmit them with impartiality and good faith,

under a penalty of $100, and that the provisions of the act should apply also to telephone companies. So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty) they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause in the act making its provisions applicable to telephones. See authorities cited in the brief of relator in that case. But the court declined to discuss that question, as the question between the parties could be determined by reference to the statute.

In *Allnutt* v. *Inglis*, 12 East, 527, the Court of King's Bench in England, in 1810, held that "where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest conferred for their benefit."

In *Vincent* v. *Chicago & Alton R. Co.*, 49 Ill. 33, the Supreme Court of Illinois held that it was the duty of a railroad company to make a personal delivery of consigned property to the consignee in cases where such delivery was practicable, and that this duty existed independent of the statute, and it was within the power of the court to enforce the observance of such duty. See also *People* v. *Manhattan Gas-Light Co.*, 45 Barb. 316; *Chic. & N. W. R. Co.* v. *People*, 56 Ill. 365; s. c., 8 Am. Rep. 690; *Munn* v. *Illinois*, 94 U. S. 13.

It is insisted by the respondent that *mandamus* is not the proper remedy in this case; that if the obligations contended for by the relator do exist, they are not enforceable by *mandamus*. To this we cannot agree. To our mind, it is the duty of respondent to furnish the transmitter and telephone to relator as it does to its other subscribers, without discrimination. That this duty arises from the trust or station assumed by respondent, and that relator has no adequate remedy at law. The duty is of the same nature as the duties of common carriers. Respondent is a common carrier of news, the same as a telegraph company. The duty of common carriers is one of law growing out of their office, and not of contract. Redf. Carr. 30, § 40. *Western Transportation* v. *Newhall*, 24 Ill. 466. The remedy by *mandamus* is the appropriate one. The duty

is of a public character, and there is no other adequate mode of relief. *Vincent* v. *Chic. & Alton R. Co., supra; State* v. *Hartford & N. H. R. Co.*, 29 Conn. 538; *People* v. *Albany & Vt. R.*, 24 N. Y. 261; 2 Shelf. Railways, 864; Moses Mand. 155, 168, 171, 176; 2 Redf. Rail. 257, 275, 294; *Chic. & N. W. Ry. Co.* v. *People*, 56 Ill. 365; s. c., 8 Am. Rep. 690; *State* v. *Bell Telephone Co., supra.*

A peremptory writ of *mandamus* must be awarded.

Writ allowed.

REDICK V. WOOLWORTH.

(17 Neb. 260.)

Contract — public policy.

S., an attorney at law, put into the hands of W., another attorney, a demand against T., under the agreement that T. was to be forced into bankruptcy, and if S. was appointed assignee, he and W. should share the attorney's fees and assignee's commissions. *Held*, not invalid.

CONTRACT. The opinion states the case. The defendant had judgment below.

Redick & Connell, for plaintiffs in error.

James W. Savage, for defendant in error.

COBB, C. J. The plaintiffs, in and by their petition in the court below, alleged that about the year 1874 the defendant, who was then and still is practicing law in the city of Omaha, put into the hands of Charles H. Sedgwick, who at that time and until about the year 1877 was a practicing lawyer in the said city, a certain claim or demand which he, said defendant, had control of, against one Henry Tucker, with the agreement and understanding between said defendant and said Sedgwick that said Tucker should be forced into bankruptcy, and if the said Sedgwick should be made assignee of said estate the said Sedgwick should attend to the business as far as consistent with his said trust, and he, said Sedgwick, should receive one equal half of all attorney's fees charged and received by said defendant, and said defendant was to receive one equal half of all commissions charged and received by said Sedgwick as such assignee when said estate should be finally closed; that in pursuance

thereof proceedings were commenced against said Tucker in bankruptcy, and the said Sedgwick was made assignee, and a long, tedious, and difficult litigation followed, and said Sedgwick took charge of the same and did the entire labor and business in connection therewith, and in all things said Sedgwick lived up to his said agreement, and all commissions received by him were divided between him and the said defendant, as well also as a retaining fee of $500 paid said defendant soon after said suit was commenced; that said cause was taken to the Supreme Court of the United States and there affirmed, which finally settled all litigation touching said estate; that about the month of April, 1878, the plaintiffs, with the knowledge and consent of said defendant, purchased of said Sedgwick his interest in all fees and commissions in said suit thereafter paid or to be paid to said defendant, and paid therefor about the sum of $800, and thereafter, with the consent of said defendant, said plaintiffs were to be subrogated to the rights of said Sedgwick therein, and that about the month of May, 1880, the said defendant received as further attorney's fees in said action the sum of about $1,800, all of which he retains, and refuses to account for or pay over to the plaintiffs or said Sedgwick said sum of money or any part thereof, though he has been often requested so to do, etc. Wherefore plaintiffs allege that he is justly indebted to them in the sum of $1,050, etc.

The defendant for answer denied that he ever put into the hands of said Sedgwick any claim or demand against one Tucker with the understanding or agreement between said defendant and said Sedgwick that said Tucker should be forced into bankruptcy, or that said Sedgwick if made assignee of said estate should attend to the business as far as consistent with said trust, and he, said Sedgwick, should receive one equal half of all attorneys' fees charged and received by said defendant, or that said defendant was to receive one equal half of said Sedgwick's commissions as charged and received by him as such assignee. He further denied that in pursuance of any such agreement or understanding proceedings were commenced against said Tucker in bankruptcy, or that said Sedgwick took charge of or did the entire labor or business in connection with a litigation in connection with said bankrupt's estate, or that in all or any matters connected with the same lived up to any agreement alleged in said petition, or that all commissions received by him were divided between him and defendant. He also denied that said

plaintiffs, with defendant's knowledge or consent, purchased of said Sedgwick his interest in all or any fees or commissions in said suit thereafter paid or to be paid to said defendant, or that said plaintiffs were to be subrogated to the rights of the said Sedgwick therein. Defendant denied that he had received commissions to the amount of $300 or $400, or that he is indebted to the said plaintiffs in any sum whatever.

For a second and further defense the defendant alleged that at the time the said Sedgwick was made assignee of the said estate of said bankrupt, he, the said Sedgwick, applied to the defendant to sign the bond which as such assignee he was required to give, and that defendant did thereupon sign the bond in such case made and provided, and thereby became security that said Sedgwick should faithfully perform his duties as such assignee and pay over all moneys coming into his hands to the proper persons and at the proper times; but the said Sedgwick did not properly execute his trust as such assignee, and collected moneys to the amount of $760 which he failed to pay over as his duty required him to do, and finally left the State of Nebraska and abandoned or was removed from his said trust, and thereupon William L. Peabody was appointed assignee in his place and stead; that the United States District Court for the district of Nebraska, sitting in bankruptcy, upon due notice to the parties concerned, ascertained the amount of the assets of said bankrupt estate which had come to said Sedgwick's hands and was by him unaccounted for as $760, and made an order on him to pay the same to said Peabody as assignee aforesaid, etc., and that defendant paid to said Peabody the said sum of $760 for said Sedgwick, and the said Sedgwick thereupon become liable to defendant for the repayment of such sum, and was so liable at the time of the pretended assignment to the plaintiffs in this action; but neither the said Sedgwick nor any person for him has paid the said sum or any part thereof. The defendant therefore claimed to set off the said sum of $760, with interest from the time of the payment thereof, against any sum, if any, which might be found due from defendant.

The said answer also contains a third and fourth defense, but which it is deemed unnecessary to further notice in this connection.

There was a reply on the part of the plaintiffs denying the several matters of defense set up in the answer.

There was a trial to a jury, a verdict for the defendant by direc-

tion of the court, a motion for a new trial overruled, a judgment for the defendant, and the cause brought to this court on error.

It appears from the bill of exceptions that the plaintiffs offered in evidence in their behalf a deposition of Charles H. Sedgwick. When they came to the sixth interrogatory, which was in the following words "Int. 6. What was the understanding and arrangement between you and the defendant, if any, with reference to business or claims he might place in your hands?" the defendant objected, or rather renewed an objection to the said interrogatory that had been made at the taking of the deposition, on the ground that the said interrogatory was incompetent, irrelevant, immaterial and improper, for the reason that it was "an attempt to prove a contract that was void as against public policy, and void as an attempt to impede the due administration of justice," which objection was sustained; and the answer of the witness, which was as follows, "I was to have one-half of the fees, costs and commissions in all such cases," was excluded. When offered, the same objection was made to interrogatories 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and was sustained.

It appears also from the bill of exceptions that upon the trial, W. J. Connell, one of the plaintiffs, was sworn as a witness, on behalf of the plaintiffs. After having testified that he was acquainted with the defendant and Charles H. Sedgwick, and to other facts introductory in their character, the witness had propounded to him by the party calling him the following question: "Q. What do you know about his (Sedgwick's) proposing to sell you a claim for law fees which he claimed to be entitled to in the case of Albert Tucker, bankrupt, where one Henry figured at a time when he was not assignee in bankruptcy?" Which question was objected to by counsel for the defendant as irrelevant and immaterial, for the reason that there is no evidence showing that any service had been performed or that any fees were due Mr. Sedgwick, and also for the reason that the only claim set up in the petition is for half of the fees as attorney and assignee, which as alleged in the petition, were to be divided between the defendant and Sedgwick, which objection was sustained and the evidence ruled out. The plaintiffs thereupon made a formal offer to prove by the witness then on the stand "that Sedgwick came to him, W. J. Connell, with a letter proposing to sell him his right to this Tucker claim for so much money, and that he (witness) afterward suggested to John I. Redick that he buy it

in company with him; that they did buy Sedgwick's claim under that contract set up in the petition, and paid him $930 in money for it; that before Redick and Connell would buy, at the suggestion of Redick, Connell went to see the defendant and had a long conversation with him about it, and told him they were going to buy Mr. Sedgwick's interest in that claim; that the defendant told him to buy it, and said he had no interest in that half of it, and induced Redick and Connell to invest $930 in that claim." This testimony was objected to by defendant's counsel as the last above, and also on the ground that the only claim set up in the petition is an illegal claim and cannot be recovered, which objection was sustained, and the said evidence was ruled out.

There was other evidence tending to prove the facts stated in the petition offered by the plaintiffs and ruled out by the court on objections offered by the defendant; but as the law upon which the case must turn sufficiently arises upon the above, it is deemed unnecessary to add to the record already quoted.

There can be no doubt that if the claim of the plaintiffs, as set up in their petition, was founded upon an agreement to do something forbidden by law, or for the doing of which the law has fixed a penalty which has a tendency to prevent or impede the due administration of justice, is subversive of morality, or contrary to sound public policy, the testimony was rightly excluded, and there could be no recovery under the petition or upon the testimony offered. On the side of the defendant it seems to be taken as conceded that there was something unlawful or wrong in the things which according to the petition the defendant and the plaintiffs' assignor agreed to do, and the authorities cited are to the effect that a contract to do an unlawful, wrong, or immoral thing, or one against morality or good policy, will not be enforced in a court of law.

The case of *Waldo* v. *Martin*, 4 B. & C., 319, was: "Where A., who held an office for life in the gift of B., agreed with C. to resign, and to procure the appointment for him and C., in consideration thereof, agreed that A. should have a moiety of the profits; A. resigned, and through his influence C. was appointed and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office, *held*, that the agreement was a fraud upon B., and therefore illegal and void." By reference to the opinion of ABBOTT, C. J., in this case, it plainly

appears that the case was not decided upon any question of public policy or the unlawfulness of the contract between A. and C., except in so far as it was a fraud on Mr. Farrar who held the appointing power.

The case of *Bills* v. *Comstock*, 12 Metc. (Mass.) 468, was where "a justice of the peace sentenced a prisoner, whom he had convicted of larceny, to pay a fine and costs, and on his failure to pay them, delivered a mittimus to an officer, who while conducting the prisoner to jail, took the promissory note of a third person for the amount of the fine and costs and his own fees, payable to the justice, and discharged the prisoner." Upon the suit brought by the justice on the note, it was held that the note was void for illegality of the consideration.

In the case of *Gray* v. *Hook*, 4 N. Y. 449, it was held that "where two persons apply to the governor of the State to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such contract is illegal and void."

In the case of *Sharp* v. *Teese*, 9 N. J. L. 352, it was held, that "a note given by an insolvent debtor to two of his creditors in consideration of their withdrawing their opposition to his discharge under the insolvent act, is void, it being against the policy of the insolvent law."

In the case at bar, the petition alleges that the defendant furnished certain claims against a certain bankrupt merchant, in consideration of which the plaintiffs' assignor agreed to furnish the labor and professional skill necessary to the successful prosecution of said claims in bankruptcy, that he would if he could procure himself to be elected assignee of said bankrupt, and that all fees and commissions, both as attorney and as assignee, should be divided equally between the two.

Mr. Bump, in his work on the Law and Practice of Bankruptcy, 133, states the law to be that an attorney for a creditor may be chosen assignee of a bankrupt's estate, and he cites as authority for the statement two adjudicated cases: *In re Lawson*, 2 Bankr. 396, and *In re Barrell*, 2 Bankr. 533. We are cited to no authority, nor am I able to find any to the contrary. I see nothing inconsistent in the duties of the two positions. The creditors by number and value have the selection of the assignee, and they alone are inter-

ested therein, and with their selection the Bankruptcy Court will not interfere, except for certain specified causes. It may be proper to speak of the position of assignee of a bankrupt estate as an office, but certainly only in the broadest and most comprehensive use of that term. It is not a public office. We are cited to no authority declaring it illegal for a person holding an office to bind himself for a lawful consideration to divide the fees of such office with another. Yet I think that it would be against public policy to treat the fees and emoluments of a public office, as such, as a proper subject of bargain and sale. But the reason for this does not apply to the fees of an assignee in bankruptcy, and I fail to see any good reason why, for a lawful consideration, such assignee could not legally obligate himself to divide his emoluments with another, as well as could a carpenter his contract price for building a house.

As I understand the petition in the case at bar, the defendant furnished the claims, or in other words, they were sent to him through the commercial agency, and defendant allowed Sedgwick to present, sue, and control them, using the name of the defendant as the attorney for the said claimants, though Sedgwick was the actual attorney. Accordingly there were two considerations on the part of Sedgwick for the agreement by the defendant to divide the attorney's fees with him: *First,* His professional services as an attorney in earning the fees to be divided; and *second,* the division by him, or agreement to divide with the defendant his fees or pay as assignee. If either one of these considerations was void by reason of being in contravention of the provisions of any statute, opposed to any recognized principle of public policy, or that their enforcement would tend to the prevention or to impede the due administration of public justice, then the entire contract would be incapable of enforcement. But I do not think that such grounds of objection, or either of them, can be sustained.

I therefore reach the conclusion that the trial court erred in excluding the deposition of Sedgwick. It necessarily also follows that the court erred in rejecting the testimony and offer of testimony of W. J. Connell, the same being testimony proper for the consideration of the jury on the question of estoppel.

The judgment of the District Court is reversed, and the cause remanded for further proceedings in accordance with law.

Reversed and remanded.

The other judges concur.

Bank of Cass County v. Morrison.

(17 Neb. 341.)

Evidence — altered instrument.

Where there is an apparent material alteration in a written instrument, the question when the alteration was made is for the jury, and the instrument is primarily receivable in evidence.*

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

Beeson & Sullivan, for appellants.

Crites & Ramsey, for appellee.

Reese, J. This is an action to foreclose a mortgage given to secure two promissory notes. The suit was instituted by plaintiff as the indorser and holder of the notes. The defense is, that after the notes were delivered by the maker to the payee they were altered by erasing therefrom the words "from maturity," by which alteration they would purport to draw interest from their date. The District Court found in favor of plaintiff, and entered a decree of foreclosure. The defendant appeals.

The only question presented is one of fact. Defendant alleges the alteration was made after the delivery of the notes to the payee. Plaintiff contends it was made before delivery. Upon the trial the notes were offered in evidence, and upon objection to their admission William L. Brown, the payee, was called as a witness, who testified that the words were erased before the notes were signed by the maker. The notes were then admitted as evidence. Upon the part of the defense the defendant Morrison testified as positively that the erasure had not been made at the time of the delivery of the notes. He further testified that the indebtedness for which the notes were given grew out of a dissolution of a partnership between himself and Brown, and that the agreement between them was that he should purchase Brown's interest in the partnership for the amount stated in the notes, and that the notes should draw no interest until after maturity. Brown testified again that the

* See note, 37 Am. Rep. 260.

notes were given for the purchase price of his interest in the partnership, as stated by Morrison, but that the contract and agreement was that the notes should draw interest from their date. Each witness seemed to be sustained by circumstances which were detailed in his testimony. Little, if any, light was thrown upon the question by other proofs.

It is claimed by plaintiff that there is nothing in the alteration which renders the erasure suspicious, the burden is upon the defendant to show by a preponderance of proof that the change was made without his consent after the delivery of the note. It is insisted by defendant that the presumption is that the change was made after delivery, and that the burden was upon plaintiff to establish by a preponderance of testimony that it was not.

The authorities upon this question are not uniform, and hence each party is fortified by a number of decisions sustaining his view of the case.

In *Neil* v. *Case*, 25 Kans. 510; s. c., 37 Am. Rep. 259, the Supreme Court of Kansas, by Chief Justice HORTON, in discussing the question of the burden of proof in cases of this kind, said: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated: First. That an alteration on the face of the writing raises no presumption either way, but the question is for the jury. Second. That it raises a presumption against the writing, and requires therefore some explanation to render it admissible. Third. That it raises such a presumption when it is suspicious, otherwise not. Fourth. That it is presumed in the absence of explanation to have been made before delivery, and therefore requires no explanation in the first instance. * * * Generally, the instruments should be given in evidence, and in a jury case should go to the jury upon ordinary proofs of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument. Perhaps there might be cases where the alteration is attended with manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not one of that character."

In *Paramore* v. *Lindsey*, 63 Mo. 67, it is said: "If nothing

appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as the person by whom and the interest with which the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence."

The record in the case at bar shows that the note was written upon a printed blank, and that the words "after maturity" were printed in the blank, that the alteration was made by drawing a pen through those words, and thus erasing them. As to whether the ink with which this erasure was made was the same as that used in filling the body of the note, the testimony is silent. In *Corcoran* v. *Doll*, 32 Cal. 89, it is said: "When printed forms are used they frequently have to be altered to suit the terms of the contract, and where an alteration is made only as to the printed matter, the presumption is that it was made prior to the execution of the contract, and made to suit it to the terms agreed upon between the parties." But it seems to us that there must be many exceptions to this rule if it is to be adopted as applicable to cases where the printed matter only is changed. There may be many *indicia* upon the face of the note itself, even in such cases. Features may present themselves which would at once impress the mind with the idea that the change has been made out of the usual way; so that while it may do to say that ordinarily the rule laid down in the California case may be a safe one, yet each case must stand upon its own merits. As is said in *Neil* v. *Case, supra:* "It is impossible to fix a cast iron rule in all cases." In ordinary cases the alteration perhaps ought not to raise a presumption against the note, because the law will not presume wrong. If the instrument, when offered in evidence, shows upon its face any thing which to the trial court is suspicious, and presents to the mind of the court a reasonable question as to whether the change was made in the usual and ordinary course of business, then upon objection, proof sufficient to overcome *prima facie* the suspicious appearance should be required before overruling the objection. But if the change consists in nothing more than the erasure of printed matter in the blank used — without interlineation — the instrument should be admitted in the first instance. Upon this point much should be left to the discretion of the trial court.

The instrument having been admitted in evidence, with or without the preliminary proof, the question of the alteration, whether made before or after its execution, becomes a question of fact like all other questions in issue, to be tried by the court or jury hearing the cause. *Neil* v. *Case, supra.*

While the writer might not have decided the case as decided by the trial court, yet this court cannot, in the exercise of its functions as a reviewing court, say the decision of the trial court was wrong. The testimony upon the trial was conflicting and quite evenly balanced.

It has been the uniform holding of this court that in cases of conflicting testimony the decision of the trial court, whether upon error or appeal, cannot be reversed unless the weight of the testimony is so manifestly against the finding as to render it clearly wrong. *McLaughlin* v. *Sandusky*, 17 Neb. 110, and cases there cited.

It follows that the decree of the District Court must be affirmed.

Decree affirmed.

The other judges concur.

HARMON V. OMAHA.

(17 Neb. 548.)

Municipal corporation — change of street grade.

Under a constitutional provision that private property shall not be damaged for public use without just compensation, a city is liable to a lot-owner for injury by raising the street grade.*

ACTION for injury to lands. The opinion states the case. The defendant had judgment below.

G. W. Ambrose, for plaintiff in error.

W. J. Connell, for defendant in error.

MAXWELL, J. The plaintiff alleges in her petition that she is the owner of the south 107 feet of lot 5 in block 248, in the city of

* See *City of Elgin* v. *Eaton* (83 Ill. 535), 25 Am. Rep. 412; *City of Akron* v. *Chamberlain Co.* (34 Ohio St. 328), 32 Am. Rep. 367.

Omaha, which is situate on the north side of Pierce street and between Eighth and Ninth streets, in said city; that she has "two dwelling-houses of five rooms each, and other usual and ordinary improvements, outhouses and the like," on said lot, all of the value of $1,200; that said houses were erected before the grade of Pierce street was established; that in the year 1878 the defendant established the grade of Pierce street, and in 1883 sought to work said street to the grade, and in doing so "filled in the earth in front of said houses and lot five feet, and compelled the plaintiff to erect a plank barricade in front of said premises in order to keep the earth away from said houses, at a cost of $100;" that in order to render said residences habitable the plaintiff will be compelled to fill said lot to the level of the street, and has sustained other damages thereby, in all to the amount of $1,600; that at no time either before or subsequent to said grading has she been allowed or tendered any compensation for said injury, etc. A demurrer to the petition was sustained in the court below, and the action dismissed.

The question presented is the right of a lot owner, who has erected buildings thereon before the grade was established, to recover damages for injury sustained by him by raising the street to his injury in front of his property. At common law an injury of this kind is not actionable, and such was the rule in this State prior to the adoption of the Constitution of 1875. *Nebraska City* v. *Lampkin*, 6 Neb. 27. Section 21 of the bill of rights of the Constitution of 1875 is as follows: "The private property of no person shall be taken or damaged for public use without just compensation therefor." The above section, without the words "or damaged," was in our former Constitution. § 13, art. I, Constitution of 1866. The words "or damaged," therefore, were without doubt added to the section for the purpose of extending a remedy to the owner of the property in all cases where his property has been damaged by the work done. Nor is the right to recover restricted to such injuries as were designated torts at common law. The question is not whether the work was skillfully and carefully performed or not, because if the property of the party has been damaged by the work however carefully and skillfully performed he is entitled to compensation for such damages. In other words the right to recover does not depend upon the skill or care, or the want of it, with which the work was performed, but whether when the work, if carefully and skillfully done, has injuriously affected or damaged the plain-

tiff's property. If so, he is entitled to recover. If the work is unskillfully or carelessly performed, so that additional damages result from that cause, it is probable that a recovery can be had therefor, but that question is not before the court.

In *Reardon* v. *City of San Francisco*, 6 Pac. R. 325, 326, the Supreme Court of California say: "We cannot say that the Convention inserting in the Constitution of this State the word 'damaged,' in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not, to superadd to the guaranty found in the former Constitution of this State and nearly all other States, a guaranty against damage where none previously existed." These remarks are applicable in this State. Our former Constitution required compensation to be made for property taken. If however no portion of the property of the party injured was taken, and the work was skillfully and carefully done, the owner was without remedy. In grading a public way a fill might be made five or fifty feet in height in front of his residence, thereby greatly depreciating it in value, and he was without means of redress. So in regard to other injuries which need not be here referred to. To afford relief in such cases the amendment above referred to was made to our present Constitution. And the Constitution was adopted by the people of the State with this express guaranty to every property owner in the State — that just compensation should be made for his property if taken or damaged for public use. The provision is self-operating and requires no legislation to carry it into effect. It is the law of this State, and should be so construed as to give effect to it.

"In construing remedial statutes there are three points to be considered, viz.: The old law, the mischief, and the remedy. That is how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief, and it is the business of judges so to construe the act as to suppress the mischief and advance the remedy." 1 Bl. Com. 87.

Applying these principles to the provisions under consideration, it is clear that it was intended to supply a defect in the common law, and requires the public — the party benefited — when taking or

damaging property for public use, to bear the burden by making just compensation therefor. And this rule applies whether the injury is committed by a railroad company or municipal corporation.

The Constitution makes no distinction as to the form of the public use for which compensation is to be made; and the court has no authority to inject words into that instrument exempting municipal corporations. There are many reasons why they should not be excepted. In this State, at least, the damage to property in cities from cuts and fills in grading streets probably affects a greater number of persons and property of greater value than is caused by all the railroads of the State outside of the cities and villages, for the reason that a railroad does not necessarily pass near residences nor cause damage to farms by cuts and fills, while in a street like that upon which the plaintiff's buildings are situated, the grading necessarily occasions more or less damage to a large number of the lot owners. The attorney for the city estimated the claims for such damages in that city at $150,000; but whatever the sum, it is evidently more just and equitable to apportion it on the property of the 60,000 or more people of the city, than upon the fifty or 500, as the case may be, lot owners who have sustained the damage. *Reardon* v. *San Francisco*, 6 Pac. Rep. 317; *Rigney* v. *Chicago*, 102 Ill. 64; *Johnson* v. *Parkersburg*, 16 W. Va. 402; *Atlanta* v. *Green*, 67 Ga. 386; *Werth* v. *Springfield*, 78 Mo. 107; *McElroy* v. *Kansas City*, 21 Fed. Rep. 257; *Gottschalk* v. *C. B. & Q. Ry. Co.*, 14 Neb. 550. An elaborate opinion of the able judge before whom the case was tried is printed in the brief of the city attorney. It contains a full review of the common-law cases; and without a provision such as is contained in our Constitution undoubtedly states the law correctly. That provision however has provided a new remedy to the owners of property damaged, which he has not discussed as fully as could be desired. Upon the whole case, we are of the opinion that the petition states a cause of action, and that the court erred in sustaining a demurrer to it. The question of the measure of damages does not arise in the case and will not be discussed. The judgment of the court below is reversed and the cause remanded for further proceedings.

Reversed and remanded.

The other judges concur.

STATE V. REPUBLICAN VALLEY RAILROAD COMPANY.

(17 Neb. 647.)

Railroad — duty to furnish stations.

A railroad company may be compelled to furnish and maintain stations for passengers and freight at all proper points on its line.

MANDAMUS. The opinion states the case.

Burke & Prout, for relator.

Marquett & Dewease, for respondent.

COBB, C. J. This is an original application to this court for a writ of *mandamus* requiring the respondent, the Republican Valley Railroad Company, to build within the corporate limits of the city of Blue Springs a depot, and to lay down the necessary side tracks and switches, and to stop its trains thereat for the proper transaction of business. The relator alleges that that part of respondent's railroad which runs from Beatrice in a south-easterly direction to a point in section 29, township 2, range 7 east, where it intersects the respondent's main, or east and west line, was built in the year 1880–1, that it was built and runs through the said city of Blue Springs; that at the time of the construction of said railroad Blue Springs was a village of one thousand inhabitants; that it contained five stores carrying general stocks of merchandise, two stores carrying stocks of hardware, two lumber yards, four implement houses, one pump and wind-mill house, three blacksmith shops, three drug stores, two hotels, two livery stables, two harness shops, two barber shops, two restaurants, two millinery shops, two printing offices, three land agents, one bank, with an average deposit of $50,000, two coal dealers, two butcher shops, one auction house, two saloons, one bakery, one jewelry store, three wagon shops, eight contractors and builders, two stock buyers, one grain dealer, one grist mill, one plow factory, one school with three departments, with a proportionate number of ministers, lawyers, and doctors.

The relator also alleges that at the time of filing the said relation, the said Blue Springs was a city of the second class of over fifteen

hundred inhabitants, with a thickly settled country contiguous thereto, and to and from which large numbers of people desired to be carried by the respondent company, and to and from which large amounts of freight, produce, stock and merchandise are annually consigned by way of the respondent's line of road; but that the respondent has neglected, failed, and refused to establish or erect any depot or station-house at said Blue Springs, or to stop all or any of its trains thereat for the receipt or discharge of either passengers or freight upon or from its said railroad.

The relator further alleges that he is engaged in the business of buying grain and selling agricultural implements and farm machinery at said Blue Springs, and that in the carrying on of his said business he has large amounts of grain to ship from said point, annually, and has consigned to him large quantities of freight; that by the refusal of the respondent to receive and discharge said freight at said Blue Springs, he is prevented from enjoying the same privileges and accommodations over the defendant's line of road as are merchants at other points on said line of railroad, etc. There are other allegations in said relation which it is not deemed necessary to notice in order to an understanding of the points decided by the court.

The respondent by its answer denies that it built its line of railroad through the village of Blue Springs, and alleges that said line of road, as located and built, was a distance from the corporate limits of said village of 988.60 feet, and that the depot built at Wymore is only 5,479¼ feet from the corporate limits of said village of Blue Springs; denies that there is any necessity for the location of a depot building nearer to Blue Springs than the location at Wymore, and alleges that it is impracticable for respondent to have and operate its line with a depot at both places, etc. Also that the Omaha & Republican Valley railroad runs through Blue Springs and has established a depot there for the accommodation of the public, "and that they have no depot at Wymore." And also that the city of Wymore has now inhabitants, and is far more important as a commercial point than Blue Springs, having and doing a great deal more business than Blue Springs.

A considerable part of the respondent's answer, as well as of its evidence, is directed to the point of the impracticability for topographical and engineering reasons of running its main or east and west line through Blue Springs. That proposition is not controverted or denied by the relator, nor do I see its relevancy to the case as

presented by the relation. It may be admitted, that so far as the main line is concerned, the respondent owes no duty to the relator.

So far then as the case is presented by the pleadings, it involves these two questions:

1. Is the depot of respondent at Wymore sufficiently near to the business portion of Blue Springs as to afford her inhabitants and merchants, and particularly the relator, all the facilities and accommodations which the respondent owes them as a common carrier, one of whose lines runs through the last named city, without discrimination against the business and inhabitants thereof? If not, 2. Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular services thereat, both at Wymore and Blue Springs?

The more important and *quasi* public question of the power of the courts in the absence of legislation to compel the respondent to establish and maintain a depot at Blue Springs, is raised by respondent in its brief, and that question will be first considered.

Relator in his brief contends that the legislature of the State has imposed upon the respondent the duty of furnishing side tracks and depots, and stopping its trains for the receipt and discharge of passengers and freight, and the proper transaction of business at all places upon their road, etc., and he cites section 121, of chapter 16. Comp. Stat., in support of that proposition. The section reads as follows: "Sec. 121. Every such railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their said road, on the due payment of fare or freight bill."

I do not think that this section furnishes authority for the interference of the courts to compel the establishment of a depot or station at any point on the line of respondent's road, but on the contrary, it is quite apparent upon the face of the section that every duty thereby imposed is qualified by the words, "to and from such stations as the trains stop at," and its application limited to established depots.

But in the opinion of this court it has authority to grant relief in cases such as that presented in this case, yet for the source of its

authority it must look to the principles of the common law rather than to legislative enactments. The respondent is a common carrier of persons and merchandise. At common law it was the duty of a common carrier by land to deliver freight personally to the consignee; but when railways took the place of conveyances drawn by animals, necessity required the relaxation of this rule so as to allow of the substitution in place of personal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods. *Vincent* v. *C. & A. R. Co.*, 49 Ill. 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed that motives of self interest almost always secure its observance. But when for any reason it is neglected or refused, may it not be enforced the same as any other public duty?

In the leading case of *Munn* v. *Illinois*, 94 U. S. 113, in the opinion, WAITE, C. J., after showing by elaborate reasoning and the citation of authorities that "when private property is devoted to public use it is subject to public regulations," etc., says: "It is insisted however that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice is otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So too in matters which do affect the public interest, and as to which legislative control may be exercised; if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge as one of the means of regulation is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. * * * Indeed the great office of statutes is to remedy

defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

The question before that court was, whether the legislature of Illinois, under the limitations upon the legislative power of the State, imposed by the Constitution of the United States, had the power to fix by law the maximum of charges for the storage of grain in warehouses at Chicago, etc. And the object of the opinion is to uphold the legislature in the exercise of such power. But I think it equally sustains the proposition, that in the absence of all legislation, the abuse of overcharging by such warehousemen could be restrained and regulated by the courts; and that the same power extends to any other abuse in the management of property which has been impressed with a public interest, and which by reason of its public use has ceased to be *juris privati* only, as well as to that of fixing a maximum charge for its use.

This question can scarcely be said to be a new one in this court. In the case of *State* v. *Nebraska Telephone Co.*, 17 Neb. 126, this court issued a peremptory *mandamus*, compelling the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to its subscribers. In the opinion by Judge REESE, he says: "Similar questions have arisen in, and have been frequently discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertake to supply a demand which is "affected with a public interest," it must supply all alike who are alike situated, and not discriminate in favor of nor against any." As a question of power, I fail to see any ground for distinguishing between that which compels a telephone company to furnish a separate instrument for the accommodation of one customer, and that which would compel a railroad company to make stoppage of its trains and furnish depot accommodations to a whole community. In neither case would any court interfere except where it is made to appear that such interference is necessary to prevent an unjust discrimination, or an abuse of that discretion which must be conceded to reside in all private corporations in respect to their dealings with the public.

The record in this case does not present the question of the power of the State to impose new duties upon railroad companies, or to take away or limit their powers by appropriate legislation. Nor does it present the question of the power of the courts to enforce the performance of every duty enjoined upon such corporations, either by the acts under which they derive their corporate existence or other legislation. If either of these questions were presented there would be abundant authority for their decision in the works and cases cited by counsel. But upon the precise point of the power of the court to enforce the discharge of a duty by the railroad company not specially enjoined upon it by the terms of its charter, nor any provision of statutory law, which as above stated I conceive to be the turning point in this case, there is but very little.

There are many opinions of courts and *dicta* in cases cited by counsel wherein the assumed right of railway corporations to discriminate between shippers and others is discussed, deprecated and denied. Such discrimination is in but few cases upheld, and then only when such discrimination is shown not to be unjust to the complaining party. The remarks of Chief Justice BEASLEY, of the Supreme Court of New Jersey, in the case of *Messenger* v. *Penn. R. Co.*, 36 N. J. L. 407, are so entirely in accord with the views of this court, that I deem it not out of place to transcribe them here. "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded, without violating natural equity and fundamental principles. And it seems to me impossible to concede that when such rights as these are handed over on public considerations to a company of individuals, such rights lose their essential characteristics. I think they are unalterably parts of the supreme authority, and in whatsoever hands they may be found they must be considered as

such. In the use of such franchises all citizens have an equal interest and equal rights, and all must under the same circumstances be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property at the discretion of the recipient, but to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become in certain aspects public agents, and the consequence is, they must in the exercise of their calling observe to all men a perfect impartiality."

While I frankly admit that I am able to find no case — certainly none has been cited by counsel — where the above principles have been applied to circumstances exactly like those of the case at bar, yet I am unable to distinguish it in principle from those in which t has been often applied, and we are, I think, unanimously of the opinion that they furnish us sufficient warrant for the exercise of the authority invoked.

As to the two questions presented by the record as above stated, 1, Whether the depot of respondent at Wymore is sufficiently near to the business portion of Blue Springs as to afford the latter named place all the facilities and accommodations which the respondent owes to them as a common carrier, etc.? And if not then, 2, Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular service thereat both at Wymore and Blue Springs? We have upon thorough examination of the evidence and consideration of the same, together with arguments thereon, as well at the bar as in the exhaustive printed briefs of counsel, found both of these questions for the relator.

A peremptory writ will therefore issue, substantially as prayed, with costs, etc.

Judgment accordingly.

The other judges concur.

CASES

IN THE

SUPREME COURT

OF

IOWA.

WAY V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

(64 Iowa, 48.)

Railroad — negligence — fraudulent use of another's ticket.

One who is injured by the negligence of a railway company while travelling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company. (*See note, p.* 434.)

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

M. A. Low, for appellant.

John F. Lacey, for appellee.

ADAMS, J. In April 1881, the decedent took passage upon a freight train at Monroe, Jasper county, for Oskaloosa. In payment of his fare, he presented a mileage ticket, which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract.

One of the conditions is in these words: "This ticket is positively not transferable, and if presented by any other than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company."

The defendant's theory upon the trial below was, that the decedent was not a passenger within the meaning of the law, and asked the court to instruct accordingly. This the court refused to do, and gave an instruction in these words: "If you find from the evidence that the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train, on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that upon its presentation in payment for transportation, the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are the same as if the ticket had been issued to the decedent, whether prior to the accident he disclosed to, or the conductor knew his identity or not."

In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: "Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of inventing, but the highest degree of care and diligence which is reasonably practicable under the circumstances, is what is required."

The giving of these instructions is assigned as error. The defendant insists that the contract relied upon, as constituting the relation of common carrier and passenger, was obtained by imposition and virtual misrepresentation, and it being now repudiated by the company by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company, and that if the relation of common carrier and passengers did not exist, the company did not owe the decedent the measure of care set forth in the instruction.

It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket, we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. By the presentation of the

ticket, the decedent falsely personated Forgrave, with the intention of deceiving the company; and he did deceive it and to its injury, for by reason of the deception he escaped the payment of the full rate with which he was otherwise chargeable.

It is not material then that the decedent obtained the conductor's consent. Whether his consent would have bound the company, if he had known that the decedent was not Forgrave, we need not inquire; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was then at the time of the injury in the car, without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company fairly obtained. But no one would claim that a mere trespasser has such rights; and it appears to us to be well settled that consent obtained by fraud is equally unavailing.

The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the duty is one which the common carrier owes only to passengers, and if as we hold the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in *T., W. & W. R. Co.* v. *Beggs*, 85 Ill. 80; s. c., 28 Am. Rep. 613. In that case the court said: "Was defendant a passenger on that train in the true sense of that term? He was travelling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances, the company could only be held liable for gross negligence, which would amount to willful injury." In Thompson on Carriers of Passengers, 43, section 3, the author goes even further. After stating the rule that the relation of carrier and passenger does not exist where one fraudulently obtains a free ride, he says: "This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of

the company, and disregard his obligations of fidelity to his employer." In *U. P. Ry. Co.* v. *Nichols*, 8 Kans. 505; s. c., 12 Am. Rep. 475, the defendant in error imposed himself upon the company as an express messenger, and obtained the consent of the conductor to carry him without fare. It was held that he did not become entitled to the rights of a passenger. The court, after quoting Shearman & Redfield's definition of a passenger, which is in these words: "A passenger is one who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such," proceeds to say: "The consent obtained from the conductor, was the consent that an express messenger might ride without paying his fare. Such consent did not apply to the plaintiff" (the defendant in error). See also the following cases: *T., W. & W. R. Co.* v. *Brooks*, 81 Ill. 292; *M. & C. R. Co.* v. *Chastine*, 54 Miss. 503; *Creed* v. *Penn. R. Co.*, 86 Penn. St. 139; s. c., 27 Am. Rep. 693; *Relf* v. *Rupp*, 3 W. & S. 21; *Hayes* v. *Wells*, 23 Cal. 185.

The plaintiff cites and relies upon *Bissell* v. *R. Co.*, 22 N. Y. 308; *Washburn* v. *Nashville, etc., R. Co.*, 3 Head, 638; *Jacobs* v. *St. Paul, etc., R. Co.*, 20 Minn. 125; *Penn. R. Co.* v. *Brooks*, 57 Penn. St. 346; *Wilton* v. *Middlesex R. Co.*, 107 Mass. 108; s. c., 9 Am. Rep. 11; *Flint, etc., R. Co.* v. *Weir*, 37 Mich. 111; *Dunn* v. *Grand Trunk Ry. Co.*, 58 Me. 192; *Edgerton* v. *N. Y., etc., R. Co.*, 39 N. Y. 227; *Gregory* v. *Burlington, etc., R. Co.*, 10 Neb. 250; *Great Northern Ry. Co.* v. *Harrison*, 10 Exch. 376. But none of these cases hold that the extraordinary care described in the instruction given is due to a person not a passenger, and none of them hold that the relation of passenger can be insisted upon, where the company shows affirmatively, as a defense, that the company's consent was obtained by fraud.

[Omitting minor matters.]

Judgment reversed.

NOTE BY THE REPORTER.— In *Toledo, etc., Ry. Co.* v. *Brooks*, 81 Ill. 245, it was even held that if a person knowingly and fraudulently induces the conductor to allow him to ride free, in violation of the rule of the company, he cannot recover for an injury. The court said: "It is urged that the court erred in refusing to give the ninth or some one of the other instructions asked by plaintiff in error, but refused by the court. That instruction asserts, that if deceased knew that the regulations of the company prohibited persons from travelling on the road without a ticket or the payment of fare, and if after being so informed, he went on the train, and by arrangement with the con-

ductor was travelling without a ticket or paying his fare, deceased, in such case, would not be a passenger, and the company would not be liable for the negligence of their officers. In some form, all these refused instructions present this question.

"Defendant in error insists that this case is governed by that of *Ohio and Mississippi R. Co.* v. *Muhling*, 30 Ill. 9. In that case the passenger had been in the employment of the road, and was neither prohibited from getting on the train, nor informed that it was against the rules for him to do so without a ticket or the payment of fare. Again the company in that case seems to have owed the plaintiff for labor, which would have enabled them to deduct the amount of fare from the amount owing him. It was there said, that if a person was lawfully on the train, and injuries ensued from the negligence of the employees of the company, the passenger thus injured might recover.

"On the part of plaintiff in error it is urged, that railroad companies, being liable for the want of care of their officers by which passengers suffer injury, must have the power to make all reasonable regulations for the government of their employees, and the power to enforce them; that it is a reasonable regulation which prohibits persons from travelling upon their roads without purchasing a ticket or paying fare, that a person going on their road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road, and the company should not be held responsible for an injury received by such person; that where a person actively participates in the violation of such a rule intentionally and knowingly, he does not occupy the same relation to the road as had he not known of the rule or not done any act to induce its violation.

"It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employees of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit. In this case the evidence tends strongly to show that both defendant in error and her husband had money more than sufficient to pay their fare to Danville, and a considerable distance beyond that place. If this be true, and defendant in error swears they had, then they were engaged in a deliberate fraud on the company, no less than by false representations to obtain their passage free from Decatur to Danville, and thus defraud the company out of the sum required to pay their fare. In this there is a broad distinction from *Muhling's* case, as in that case there was no pretense of fraud or wrong on his part. The court below should have given some one of the defendant's instructions which announced the view here expressed."

This case was followed in *Chicago, etc., R. Co.* v. *Michie*, 83 Ill. 427, where the [illegible] persuaded the engineer to let him ride on the engine, against the

rule. The court said: "The sole question is, as appellee has stated it in the declaration, was deceased a passenger on this train, or was he on the train at the instance and request of appellant? That he was not a passenger, and that he was on the train furtively and in violation of the rules of the company, the evidence places beyond a doubt. The permission of the engine-driver, if given, was not the permission of the company as he had no power to give it. Had the conductor of the train given the permission, or knowing the deceased was upon the engine, suffered him there to remain, it might be considered the act of the company, as the conductor has control of the entire train, and his act is rightfully regarded as the act of the company, and the authorities cited by appellee on this point might be applicable. The driver of the engine occupies a different and a very subordinate position. He has no right to say who shall be upon the train, or to take cognizance of such as may be upon it. He is to look to his engine and keep it in order, and permit no one to ride upon it without the permission of his superior. The proofs in this case show that deceased was on the engine of this train, where he had no right to be, and by stealth, having by some means induced the driver to violate an established rule of the company— the deceased from his long experience in the same capacity having reason to know the existence of such a rule, and that it was a rule of the company in whose service he had been recently employed. To hold the company liable for the death of this man, under these circumstances, would not be just. Deceased, in going upon the engine in the manner he did, willingly took his chances of just such an accident as did happen, and for the consequences of which appellant is not responsible. Being on the engine by stealth, the company were under no obligations to him. See *Toledo, Wabash & Western Ry. Co.* v. *Brooks, Adm'rx*, 81 Ill. 245."

In *Memphis, etc., Ry. Co.* v. *Chastine*, 54 Miss. 503, cited in the principal opinion, it was merely said, that where the passenger had innocently paid the conductor with a counterfeit bill, the company was under no obligation to transport him, and might have ejected him if he had refused to rectify it.

In *Rucker* v. *Mo. Pac. Ry. Co.*, 61 Tex. 499, a recovery was denied to one who had bribed the fireman with half a dollar to let him ride on the pilot of the locomotive. See also, *Duff* v. *Allegheny R. Co.*, 91 Penn. St. 458; 36 Am. Rep. 675. But see *Siegrist* v. *Arnot*, 10 Mo. App. 197.

LEWIS v. TILTON.

(64 Iowa, 220.)

Association — unincorporated — liability of members.

Persons contracting in the name of an association which is unincorporated are personally liable.

ACTION on a lease. The opinion states the case. The defendant had judgment below.

Williams, Jaques & Adler, for appellant.

Chambers & McElroy, for appellees.

SEEVERS, J. [Minor point omitted.] The more serious question is whether the defendants are individually liable under the lease, which on its face shows that it was entered into between the plaintiff, as party of the first part, and the Ottumwa Temperance Reform Club, party of the second part, and is signed by the plaintiff, and by the defendants as follows:

"Executive committee of the Ottumwa Temperance Reform Club. { R. L. TILTON, S. B. THRALL, DAVID EATON, JOSEPH SLOAN."

It is insisted that the lease shows that credit was extended to the club, and that the contract was made with it; that the principal was named, and therefore the defendants cannot be made individually liable. This line of argument possibly would be conclusive if there was a principal. But there is none. The club is a myth. It has no legal existence, and never had. It cannot sue or be sued. The defendants contracted in the name of a supposed principal; that is, they claim there was a principal for whom they were acting, but it now appears that there was no principal known to the law. But under the allegations of the amended petition, it should be assumed, we think, that there was as a matter of fact a body of men associated together for a benevolent purpose, who had assumed the name above stated, for the avowed purpose, by their united efforts of suppressing intemperance. There is however some doubt in our minds whether it can be said that the plaintiff extended credit to an organization that had no legal existence. As the law does not recognize such an organization, we are at a loss to know how or why it can be said as a matter of law that the plaintiff contracted with, and extended credit to a mere myth. In legal parlance, the organization cannot be named. It has no habitation or place of abode.

It is also insisted that a fund was provided for the payment of debts, and hence it must be presumed that the plaintiff contracted in reliance upon such fund, and therefore the defendants cannot be made individually liable. What the fact may be we are not advised, but certainly this does not appear on the face of the petition, and

we have looked into the lease, and there is no provision in it from which such an inference can be drawn.

It is also insisted that there is no known legal principle or rule under which the defendants can be made liable. It is said that they are not parties. This is true; that is to say, these defendants could not bind any other members of the organization as a partner in a joint enterprise, or a contract as to which he had no knowledge, and to which he did not assent. But we think "those who engage in the enterprise (that is, became members of the organization) are liable for the debts. They contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it." It was also held in *Ash* v. *Guie*, 97 Penn. St. 493; s. c., 39 Am. Rep. 818; *Fredendall* v. *Taylor*, 26 Wis. 286, and this rule is supported to some extent by what was said by this court in *Keller* v. *Tracy*, 11 Iowa, 530, and *Drake* v. *Board of Trustees*, 11 Iowa, 54.

But it is said, these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence. We think the demurrer should have been overruled.

Judgment reversed.

Hathaway v. State Insurance Company.

(64 Iowa, 229.)

Insurance — change of title — sale by one partner to another.

Where partnership property is insured against fire to the firm, a sale by one of the firm to the other partners is a "change of title," avoiding the policy. (*See note, p.* 442.)

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Fouke & Lyon, Ainsworth & Hobson and *J B. Johnson,* for appellant.

John Hutchinson and *Hoyt & Hancock,* for appellee.

D. W. Clements, for intervenor.

REED, J. The policy of insurance in question was issued to Hathaway & Smith, a partnership composed of plaintiff and E. P. Smith. They were merchants, and the policy covered the stock of goods kept by them in their store. Before the loss occurred the partnership was dissolved, and plaintiff bought the interest of Smith in the firm property, and continued to carry on the business. He alleges in his petition that Smith wholly transferred to him his interest in the policy, and that defendant had notice of such transfer and consented to it. The policy contains the following provision: "If the title of the property is transferred, incumbered or changed, or if without written consent hereon the policy is assigned, then and in every such case, the policy shall be void."

The principal matter of defense relied on by defendant is the sale and transfer by Smith to plaintiff of his interest in the insured property — the claim being that under the provision quoted, the policy is rendered void by such sale and transfer.

The allegation that defendant had notice of the sale and transfer, and consented to it, was not proved on the trial, and the Circuit Court held in effect that it was not essential to plaintiff's right to recover that it should be proven. Defendant presented a number of instructions to the court and asked that they be given to the jury. These instructions present, in various forms, the proposition that the sale by Smith to plaintiff of his interest in the insured property, before the loss, was such a change of the title to the property as avoided the policy. The court refused to give these instructions, and told the jury that the only questions which they had to determine were, whether the stock of goods covered by the policy was damaged by fire, and if so, what was the amount of the damage so caused.

The vital question in the case then is, whether under this provision of the policy, said sale and transfer by Smith of his interest in the property had the effect to terminate the contract.

[Minor point omitted.]

Whether the sale by Smith of his interest has the effect claimed by defendant depends upon the construction which shall be placed on the words of the provision of the policy quoted above. The question as to the effect on the contract of insurance of the sale by one joint owner to another of his interest in the joint property, when the policy contains a provision against alienation, has often been before the courts; and the numerical weight of authority is probably in favor of the proposition that a sale by one partner to his copartner of his interest in the partnership property does not have the effect to terminate a policy of insurance which contains a provision against the sale or transfer of the property. The case of *Hoffman* v. *Ætna Insurance Company*, 32 N. Y. 405, is probably the leading case holding this doctrine. The policy in that case provided that it should be null and void, "if the said property shall be sold or conveyed." The policy was issued to a partnership, one member of which sold his interest in the property to his copartner before the loss, and it was held that this did not have the effect to avoid the policy; and this holding is followed in *Dermani* v. *Ins. Co.*, 26 La. Ann. 69; s. c., 21 Am. Rep. 544; *Pierce* v. *Ins. Co.*, 50 N. H. 297; *Burnett* v. *Ins. Co.*, 46 Ala. 11; s. c., 7 Am. Rep. 581, and *West* v. *Ins. Co.*, 27 Ohio St. 1; s. c., 22 Am. Rep. 294; in each of which cases the policy contained substantially the same provision. The ground upon which the holding is put, is that the alienation against which the parties provided by the provision was of the whole of the insured property, and not merely a portion of it, or some interest in it less than the whole; and that a sale of his interest by one partner to his copartner was not such a disposition of the property as was contemplated by the parties when they framed the provision; that what was intended to be guarded against was such a transfer of the property as would change the proprietary interest therein of the parties with whom the insurers contracted, and substitute others with whom they had not consented to contract; but that the sale of his interest by one partner to his copartner did not have the effect to introduce a stranger to the contract, or to make any change in the condition or situation of the property or risk. In *Cowan* v. *State Ins. Co.*, 40 Iowa, 551; s. c., 20 Am. Rep. 583, the policy was issued to plaintiff, but before the loss he sold the insured property to a partnership of which he was a member. It contained a similar provision against alienation, and it was held by this court,

that as he retained an insurable interest in the property, the policy was not avoided by the sale; that while the clause in the policy prohibited the alienation of the insured property, it did not forbid the sale of an interest therein less than the whole, and as long as the plaintiff retained an insurable interest in the property, the policy attached to, and protected that interest. We think it clear that this case does not sustain the position of appellee in the case now before us. The facts of the two cases and the questions involved are essentially different. In the one, the party seeking to enforce the contract was an original party to it, and the question involved was whether his right of recovery was defeated by his sale of an interest in the insured property, while in this case plaintiff is not personally a party to the contract, and the question is whether he acquired a right of action on the policy by his purchase of an additional interest in the property. Nor do we think that the other cases cited above are conclusive of the question here involved. The provisions of the policies involved in those cases were that the policies should be null and void if the property was sold or conveyed, while the provision in this case is that "if the title of the property is transferred, incumbered or changed, * * * the policy shall be void." The effect of this language is materially different from that used in the policies in the other cases. The title of the property would be transferred by a sale or conveyance of it to another person. If the word "changed" had not been inserted in the provision, the effect of the language would have been the same as that used in the other policies, and the same construction which was put upon the provisions in those cases could fairly have been put upon it. But the parties, having inserted in their contract words which fully express the provision that the policy would be avoided by a sale or conveyance of the property to a stranger, have also inserted another word, by which the same consequence is made to follow a change of title to the property. It is certainly true that by a transfer of the title to the whole of the property to a stranger the title would be changed, but we cannot presume that the parties intended to express that provision by the use of the word "changed," for as we have seen, they had already expressed it by the words which precede it in the contract.

This latter word was deliberately used by the parties, and we cannot reject it in construing the contract, and as it neither limits nor qualifies those which precede it, we are bound to presume that the

parties intended by its use to express some provision or condition of their contract which was not otherwise expressed.

The effect of the provision is then that the policy would be avoided, either by a transfer of the title of the property insured to a stranger or by a change of the title to it. This conclusion can be avoided, as we think, only by disregarding the elementary rules of construction.

The case turns then upon the question whether a change of the title of the property occurred upon the dissolution of the partnership and the sale by Smith to plaintiff of all his interest in the property, and it seems to us there can be but one answer to this question. During the existence of the partnership it cannot be said that plaintiff had title to any specific share or interest in the property. His claim was to the proportion of the residue which should be found to be due to him upon the final balance of the accounts of the firm, after the conversion of the assets and the liquidation of its debt. But upon the dissolution of the partnership, and the purchase by him of Smith's interest, he was vested with the absolute title to the whole of the property. We think therefore that the Circuit Court erred in refusing to give the instructions asked by defendant.

The conclusion we reach is sustained by the following authorities: *Keeler* v. *Niagara Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co.* v. *Ross*, 23 Ind. 179; *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272; *Wood* v. *Rutland Ins. Co.*, 31 Vt. 552. *Judgment reversed.*

NOTE BY THE REPORTER. — In *Keeler* v. *Niagara Fire Ins. Co.*, 16 Wis. 523, the court said: "The question was quite fully discussed whether such a sale by one partner to the other was within the provision. The weight of authority seems to hold that it would be, although there are cases containing intimations to the contrary. And the same reasons which would induce a company to protect itself against a sale to strangers may exist in a sale from one partner to another. In making contracts of insurance the company has regard to the habits and character of the other contracting parties. If a firm is composed in part of prudent, careful men, a company may be willing to insure the property of the firm, though the others were of an entirely different character. But if after this was done, those who were prudent and careful could by selling out to the others leave the company exposed to the unguarded negligence of the latter, it might suffer the same evil as from a sale to strangers. We hold therefore that the sale by one partner to the other was within the provision."

So in *Hartford Fire Ins. Co.* v. *Ross*, 23 Ind. 179, it was held: To the insurers "the contract is purely a personal one, and the condition of the contract is that the persons with whom they enter into it shall remain the same. * * * The

introduction of a new partner may introduce a dangerous element; the retirement of one member of the firm, or of one owner in the property may withdraw also the personal integrity or the skillful care that induced the insurance."

The same reasoning and decision are found in *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272; *Wood* v. *Rutland, etc., Ins. Co.*, 31 Vt. 552; *Finlay* v. *Lycoming Ins. Co.*, 80 Penn. St. 311.

In the Indiana case however the policy prohibited the sale or change of title of "*any interest*" as well as of the whole property.

On the other hand, in *Hoffman* v. *Ætna Fire Ins. Co.*, 32 N. Y. 405, where the policy simply prohibited the sale of "the property" (a stock of goods), it was held that it inured to the benefit of the remaining members of the firm after the retirement of one. The court distinguish the case of *Tillon* v. *Kingston Mut. Ins. Co.*, 5 N. Y. 405 (Mr. Wood cites this to the other doctrine, Ins. 560), and explain that the syllabus mis-states the decision. (See page 410.) The court said: "If the assured parted with the possession, as well as the title to the goods, the insurers knew of course that their liability would cease; but they were aware that in the exigencies of business parties often retain the control, possession and apparent ownership of goods, after parting with all their title. To guard against such contingencies, they chose to provide for the forfeiture of the policy on the transfer of the title to others, even though the business should continue to be conducted by the assured. It is suggested that the proviso may have been designed to secure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all, and the theory is rather fanciful than sound that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them." "The policy in question having been issued to a mercantile firm, the company must be deemed to have had in view the fluctuating nature of a partnership business, and the changes of relative interest incident to that relation. It is manifest that mere variations in the character and amounts of the interests of the assured, as between themselves, did not constitute the mischief at which the proviso was aimed." "The design of the provision was not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured." "It was to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others, whom they might not be equally willing to trust."

The following cases also hold that a transfer by one partner of his interest in the goods to his copartners is not a sale, conveyance or change of interest, within the meaning of the policy: *Barnett* v. *Eufaula Home Ins. Co.*, 46 Ala. 11; s. c., 7 Am. Rep. 581; *Pierce* v. *Nashua Ins. Co.*, 50 N. H. 297; s. c., 9 Am. Rep. 285; *Cowan* v. *Iowa State Ins. Co.*, 40 Iowa 551; s. c., 20 Am. Rep. 583; *Dermani* v. *Home Mut. Ins. Co.*, 26 La. Ann. 69; s. c., 21 Am. Rep. 544; *West* v. *Citizens' Ins. Co.*, 27 Ohio St. 1; s. c., 22 Am. Rep. 294; *Powers* v. *Guardian F. & L. Ins. Co.*, 136 Mass. 108; s. c., 49 Am. Rep. 20; *Texas Banking & Ins. Co.* v. *Cohen*, 47 Tex. 406; s. c., 26 Am. Rep. 298. See also note, 49 Am. Rep. 22, and *Keeney* v. *Horne*, 71 N. Y. 396; s. c., 27 Am. Rep. 60.

It will be seen that the weight of authority is decidedly against the principal case.

MOORE v. MONROE.

(64 Iowa, 367.)

Constitutional law — reading in public schools.

A statute providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is constitutional.

ACTION for injunction to restrain the reading of the Bible in a public school. The opinion states the point. Injunction refused below.

F. W. Moore and *S. H. Steele*, for appellant.

S. S. Carruthers and *Payne & Eichelberger*, for appellees.

ADAMS, J. The record shows that the teachers of the school are accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's prayer, and singing religious songs; that the plaintiff has two children in the school, but that they are not required to be present during the time thus occupied. The record further shows that the plaintiff objected to such exercises, and requested that they be discontinued; but that the teachers refused to discontinue them, and the directors refused to take any action in the matter.

The plaintiff concedes that under a statute of Iowa, section 1764 of the Code, if constitutional, neither the school directors nor courts have power to exclude the Bible from public schools. The provision of the statute is in these words: "The Bible shall not be excluded from any school or institution in this State, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian."

Under this provision, it is a matter of individual option with school teachers as to whether they will use the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian. It was doubtless thought by the legislature that an attempt on the part of the school boards to exclude by official action the Bible from schools would result in unseemly controversies,

to be decided ultimately at the polls, and that such controversies would naturally disturb the harmony of school districts and impair the efficiency of schools. Whether the provision is a wise one it is unnecessary for us to express any opinion. It is the law of the State, unless unconstitutional.

The plaintiff insists however that it is unconstitutional. The provision of the Constitution with which it is said to conflict is article 1, section 3, Bill of Rights. The provision is in these words: "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry."

The plaintiff's position is that by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a tax payer, is compelled to pay taxes for building and repairing a place of worship.

We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship within the meaning of the Constitution, we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden. It is perhaps not to be denied that the principle carried out to its extreme logical results might be sufficient to sustain the appellant's position, yet we cannot think that the people of Iowa, in adopting the Constitution, had such extreme view in mind. The burden of taxation, by reason of the casual use of a public building for worship, or even such

stated use as that shown in the case at bar, is not appreciably greater. We do not think indeed that the plaintiff's real objection grows out of the matter of taxation. We infer from his argument that his real objection is that the religious exercises are made a part of the educational system into which his children must be drawn, or made to appear singular, and perhaps be subjected to some inconvenience. But so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regarded it as of greater weight than we do, we should have to say that we do not find any thing in the Constitution or law upon which the plaintiff can properly ground his application for relief.

Possibly the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission. We think that the injunction was properly denied.

Judgment affirmed.

Campbell v. Brown.

(64 Iowa, 425.)

Executor — foreign — suit on claim assigned by.

An action will lie in Iowa on a claim assigned to the plaintiff by a foreign executor, although there has been no probate or administration in Iowa. (*See note, p.* 448.)

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

Mitchell & Pennick, for appellants.

Tannehill & Fee, for appellee.

Seevers, J. The principal question discussed by counsel is whether the plaintiff can maintain this action. W. W. Campbell, the payee of the notes, at the time of his death in 1882, resided in the State of Illinois. The notes were in his possession in that State, and by his last will he devised the same to the plaintiff. The will was duly admitted to probate in said State, and an executor of the estate appointed in the State of Illinois. The executor assigned the

notes to the plaintiff in pursuance of a bequest made in the will. This action was reported to and approved by the court that appointed the executor. The will never was filed nor admitted to probate in or by any court in this State; nor has any administrator of the estate been appointed in this State. It does not appear whether or not the decedent was indebted to any resident of this State.

It is insisted that a foreign executor cannot maintain an action in the courts of this State. For the purposes of this case, this will be conceded, and this being done, it is further insisted, that for the same reason, the assignee of such an executor cannot maintain such an action. Counsel cite and rely on *Thompson* v. *Wilson*, 2 N. H. 291; *Stearns* v. *Burnham*, 5 Me. 261, and *Dial* v. *Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737.

These cases sustain the proposition above stated. The reasoning upon which they are based largely is that the authority of an executor is limited to the State in which he was appointed, and that every State should prevent the removal of the property of an estate until it has been determined that there are no creditors, citizens of the State, who are entitled to have such property appropriated to the payment of the indebtedness due them in accordance with the laws of the State in which they reside.

There are authorities which announce a different rule, and it has been held that a foreign executor may assign a promissory note, and that his assignee may maintain an action thereon in the courts of a State other than that in which the executor was appointed. *Harper* v. *Butler*, 2 Pet. 239; *Wilkins* v. *Ellett*, 108 U. S. 256; *Rand* v. *Hubbard*, 4 Metc. (Mass.) 252; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *Owen* v. *Moody*, 29 Miss. 79; Story Confl. Laws, § 359. The reasoning upon which these cases are based mainly is that the title to promissory notes belonging to an estate vests in the executor, and that he can do what the decedent could have done in his life-time; that is, assign the notes so as to vest title in his assignee, so as to enable him as such owner to maintain an action thereon against the maker in the courts of any State in which the latter resides. This seems to us to be the better view, and we therefore adopt it, deeming it unnecessary to state at greater length the reasoning upon which the cited cases are based.

[Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER.— In *Peterson* v. *Chemical Bank*, 32 N. Y. 21, DENIO, C. J., said: "It is not therefore because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability however inconsistent with principle, is very firmly established. * * * But the principle of law which I think governs this case is that the succession to the personal estate of a deceased person is governed by the law of the country of his domicile at the time of his death." "It is not so held because the foreign legislature or the local institutions have any extra-territorial force, but from the comity of nations. Accordingly it is a necessary supplement to the doctrine, that if the law-making power of the State, where the property happens to be situated, or the debtor of the deceased resides, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of domicile, they must take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications, is that which is intended to secure the creditors of the deceased residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are." "There is not, I think, any reason why the plaintiff should be precluded from maintaining his action on account of his making title through a foreign administration. The rule is not that our courts do not recognize titles thus acquired. It is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interests, and represents no one. In my opinion, the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or of policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed, in any manner allowed by law; and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations." "The fact that the transfer was made for the purpose of getting rid of the objection should not prejudice the plaintiff."

JACKSON v. TRAER.

(64 Iowa, 469.)

Corporation — issue of stock below par.

A railway company, being indebted to a construction company in the sum of $70,000, which it could not pay, issued to the members of the construction company, in satisfaction, certificates of its stock of the face value of $350,000. *Held*, that the receivers were liable, as stockholders, to creditors of the railway company, for the remaining eighty per cent of the par value.

THE opinion states the case. The plaintiff had judgment below.

P. Henry Smyth & Son and *D. L. Glasgow*, for plaintiff.

Hubbard, Clarke & Dawley, for appellee.

ADAMS, J. This case is now before us upon a rehearing. It was submitted originally with the case of Louisa County National Bank against the same defendants. Both plaintiffs and defendants in the two actions appealed. The judgments were affirmed upon the plaintiffs' appeals, and reversed upon the defendants'. The plaintiff Jackson filed a petition for a rehearing, and a rehearing was granted. The questions presented upon the rehearing pertain to the correctness of the decision of this court upon the defendants' appeal. The action is brought under sections 1082 and 1084 of the Code. The plaintiff is a judgment creditor of the Burlington, Cedar Rapids and Minnesota Railway Company. The object of the action is to obtain an execution against stockholders of the company. It was brought originally against George Greene, as well as against the defendant Traer. Since then George Greene has died, and the defendant William Greene has been appointed administrator of his estate. The action was brought upon the theory that Traer and George Greene were at the time of the commencement of the action, stockholders in the debtor company, and that eighty per cent of their stock remained unpaid. The defendants for answer filed a general denial, and pleaded that the plaintiff's judgment had been paid.

The court below held that Traer and George Greene were at the commencement of the action stockholders, and that eighty per cent of their stock remain unpaid, and rendered judgment for the plain-

& Connellsville Gas, Coal & Coke Co., 69 Penn. St. 334; *Boynton* v. *Hatch*, 47 N. Y. 225; *Tallmadge* v. *Fishkill Iron Co.*, 4 Barb. 382. The same doctrine was held by this court in *Osgood* v. *King*, 42 Iowa, 478. Property known to be less than the par value of the stock was received in full payment. This court condemned the transaction. Mr. Justice DAY, in the opinion, said: "The intention of the law is, that property or a fund equal to the capital stock of the company, or so much of it as the articles of incorporation require to be subscribed previous to commencing business, shall in fact exist, and be subject to the debts of the corporation." The case at bar, in our opinion, is not different in any material respect. If the officers of a company cannot be allowed to receive in full payment for stock property known to be of less value than the par value of the stock, it requires no demonstration to show that they cannot be allowed to receive in money less than the par value. The case at bar differs only in this, that the value of what was received was certain, and did not need to be established by evidence.

It should be observed that the agreement that the remaining eighty per cent should not be called for was not an agreement to which all the stockholders of the railway company were parties. Had it been, there would be more ground for contending that the agreement was valid, and some support might be found in the English decisions for such position. But even if such had been the case, the defendant's position could not be supported by the decisions in this country. In *Scovill* v. *Thayer*, 105 U. S. 143, stock had been issued to all the stockholders, with an understanding on the part of all, that only ten cents on a dollar should be called for. WOOD, J., after referring to the English decisions, says: "But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full." In *Union Mut. Life Ins. Co.* v. *Frear Stone Man'f Co.*, 97 Ill. 537; s. c., 37 Am. Rep. 129, a similar doctrine was held. The court said: "The secret agreement of the shareholders in this case must be regarded as void, certainly as to creditors of the corporation without notice."

In *Rider* v. *Morrison*, 54 Md. 429, the directors had undertaken to release a subscriber from his unpaid subscription, but the court held that unpaid subscription to the stock of a corporation is a trust fund, to be held by the corporation for the benefit of creditors, and

that the directors had no power to release a subscriber to the prejudice of creditors. In *Jewell* v. *Rock River Paper Co.*, 101 Ill. 57, there was a private understanding with some of the stockholders at the time of their subscription that full payment should not be called for. It was held that such private understanding could not be sustained. In *Wetherbee* v. *Baker*, 35 N. J. Eq., 501, it was held that the officers of a corporation are the trustees of its subscriptions to its stock, and hold them as a trust fund, and that the trust cannot be defeated by any device short of actual payment in good faith. In *Crawford* v. *Rohrer*, 59 Md. 599, it was held that any arrangement among stockholders by which stock is but nominally paid for, whether in money or property, will not be regarded as a valid payment as against creditors. In *Kehlor* v. *Lademann*, 11 Mo. App. 550, it was held, that while stock might be issued to a creditor in payment of indebtedness, and issued as full paid stock, yet if it was issued for less than its par value, a creditor could recover the difference. In Morawetz on Corporations, section 374, the author says: "The issue of paid up shares at less than their par value is not alone a fraud upon the creditors; it is a fraud upon every member who has contributed his full proportion," citing the same cases cited in Green's Brice's Ultra Vires. Again the same author says, in section 589: "The law is settled that every device by which the stockholders of a corporation seek to discharge themselves from liability to pay their stock subscriptions in full will be treated as a fraud upon creditors, and may be set aside if the company should afterward become insolvent. Thus it has been held that a release executed by a corporation to its stockholders, or simulated payment of the stock subscriptions and return of the money to the subscribers in the shape of a loan, will not be allowed to defeat the just expectations of creditors; and a resolution that the shares issued by a corporation shall be deemed paid up shares. although unanimously adopted in a corporate meeting, is equally insufficient to effect its purpose;" citing *Upton* v. *Tribilcock*, 95 U. S. 45; *Upton* v. *Hansbrough*, 3 Biss. 417; *Sawyer* v. *Hoag*, 17 Wall. 610; *Slee* v. *Bloom*, 19 Johns. 456; *Sagory* v. *Dubois*, 3 Sandf. Ch. 466; *Osgood* v. *King*, 42 Iowa, 478; *Burnham* v. *N. W. Ins. Co.*, 36 Iowa, 632; *Mann* v. *Cooke*, 20 Conn. 178; *Pickering* v. *Templeton*, 2 Mo. App. 424; *Skrainka* v. *Allen*, 7 Mo. App. 434; *Chouteau* v. *Dean*, 7 Mo. App. 210; *Gill* v. *Balis*, 72 Mo. 424; *Woodfork* v. *Union Bank*, 3 Coldw. 488.

It is contended however that it does not appear that George Greene and Traer became stockholders in pursuance of any subscription to the stock, and that the authorities respecting the liability of stockholders to pay in full for stock are for this reason not applicable.

It may be conceded that it does not appear that these stockholders entered into a written contract of subscription. It seems probable that they became stockholders simply by the acceptance of the stock in question. That a person may become a stockholder in this way is not denied, and could not be properly. The question presented then is as to what are the liabilities of a stockholder who becomes such without any subscription. Does he, by reason simply of the acceptance of stock, become liable to pay for it the price fixed therefor in the articles of incoporation? In our opinion he does. The principle involved has been repeatedly decided. See *Nulton* v. *Clayton*, 54 Iowa, 425. In that case it did not appear that there was any express promise by the defendant to pay for the stock, but this court held that he could not, for that reason, escape liability; following *Spear* v. *Crawford*, 14 Wend. 20; *Hartford & New Haven R. Co.* v. *Kennedy*, 12 Conn. 499; *Rensselaer & N. W. Plank R. Co.* v. *Barton*, 16 N. Y. 457; *Small* v. *Herkimer Manufacturing Co.*, 2 N. Y. 330; *Dayton* v. *Borst*, 31 N. Y. 435; *Hartford & New Haven R. Co.* v. *Croswell*, 5 Hill, 383. The doctrine of the cases is, that the liability to pay for stock the price fixed by the articles of incorporation does not necessarily exist by express contract, but may arise by implication of law out of the mere relation of stockholder.

It is probably true, that if no stock has been issued to and accepted by the person sought to be charged, there should be, in order to bind him, a written subscription. *Pittsburgh & Connellsville R. Co.* v. *Clarke*, 29 Penn. St. 146. But that need only be an agreement to take stock and need not contain any promise to pay for it. See authorities above cited. An agreement to take stock, when in writing and accepted by the company, creates the relation of stockholder. The issuance of a certificate in such case is not necessary. See Taylor on Corporations, section 511, and authorities cited. But where the person sought to be charged has already taken the stock by an acceptance of certificates, the necessity for a written agreement to take stock is superseded. The relation of stockholder exists beyond controversy. Whenever this relation ex-

ists the law determines the rights and liabilities of the stockholders. We have seen no case which recognizes a difference between those stockholders who become such in pursuance of a written agreement, and those who become such by the mere acceptance of stock issued to them. To hold then that where there is an agreement in writing to take stock, even though it is not taken, it must be paid for as contemplated in the articles of incorporation, and that it need not be thus paid for if taken without such agreement, would be to make a distinction for which we find no warrant in the decisions, and for which there is certainly none in principle.

It is undisputed that a mere transferee of stock not fully paid becomes liable to pay the balance, unless the stock has been issued as fully paid, and he has acquired the same in ignorance that it was not fully paid in fact. The liability of a transferee does not arise by reason of an express contract with the company. His liability is imposed by law as arising by implication out of the relation of stockholder. It would be strange if there were not the same implication where a person takes stock directly from the company, though he does so only by oral agreement. He is not the less a stockholder, and is not entitled to less rights as a stockholder. There is no reason why his rights should be disproportionately greater than his burdens.

No one, we think, in this State thus far, when desiring to estimate the responsibility of a corporation, has thought of inquiring further in respect to its issued stock than was necessary to ascertain the amount issued. If we should hold the rule contended for, the amount of stock issued would not of itself furnish any indication in regard to the responsibility of the company. Whoever should desire to estimate the responsibility of a given corporation would need to ascertain all the agreements, written and oral, open and secret, under which the stock had been issued.

We are aware that a corporation which commences to incur the hazards of business with its stock only partly taken may find itself in a condition which would render it impossible for it to dispose of its stock at par. Whenever a corporation enters upon business which its resources do not justify, it is guilty of an irregularity. But that is no reason why it should be allowed to relieve itself by perpetrating another irregularity, and one which the law denominates a fraud.

The true theory is that the capital stock of a corporation is fixed

with reference to its supposed largest needs, to be all subscribed, and to be paid for in cash at once, or to be called in from time to time, in successive installments, as the actual needs of the corporation may require. Whenever a corporation has imprudently commenced business, and incurred hazards, with a partial and insufficient amount of stock taken, and can dispose of no more stock at par, such corporation is ordinarily a source of danger to the public, and when such, the sooner it is wound up the better. The courts certainly should not aid it to prolong its existence by methods which the statute does not contemplate.

The defendants rely upon *Phelan* v. *Hazard*, 5 Dill. 45. But that is not a case where stock had been issued as fully paid, when there was no pretense that it had been fully paid in fact. Property had been taken in payment, and as we infer as a payment of the full par value. The court refused to presume fraud, and said: "While the contract stands unimpeached, the court, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." But in the case at bar the contract does not stand unimpeached, unless twenty cents can honestly be estimated as worth one hundred cents, or unless stock can be issued as fully paid when there is no pretense that it is fully paid in fact. Some other cases are cited by the defendants, most of which fall substantially under the rule in *Phelan* v. *Hazard*, and have no application to the case at bar.

The case of *New Albany* v. *Burke*, 11 Wall. 96, has been cited, but we have to say, upon a careful examination of the case, that we do not discover any thing in it which appears to us to be inconsistent with the view which we have expressed.

The case of *Van Colt* v. *Van Brunt*, 82 N. Y. 535, might upon a cursory examination be thought to support the defendant's position, and we have to say that it would seem that it does, if it holds what is claimed for it, and what some text-writers seem to think that it does. But the opinion is not clear. There are expressions in it which indicate strongly that the stock was not issued as fully paid. If it was not, then the decision has no application as authority in the case at bar. One of the expressions referred to is in these words: "In view of the facts presented, no sufficient reason appears why the stock held by Van Brunt, and not subscribed by him, should be treated and regarded as full paid-up stock. It was evidently intended by the parties that it should not." But conced-

ing that the case holds what the defendants claim that it does, we do not think, in view of our statute, that we should be justified in following it. Besides we observe that the correctness of the opinion has not passed unchallenged. In Morawetz on Corporations, section 589, note, the author assuming that the case holds that stock may be issued as fully paid for less than its par value, says: "It is submitted that this decision is supported neither by reason nor authority."

One position taken by the defendants remains to be noticed, and that is, that the stock issued as fully paid was entirely worthless. In our opinion the worthlessness of the stock would not enable the defendants to escape the statutory liability. If the stock was worthless, as the defendants claim, there was so much the greater reason why the stockholders should not hold themselves out under false pretenses. If the stock was worthless, and the contract by which it was issued was based upon that theory as we understand the defendant's counsel to claim, it seems to us that the conduct of Traer and Greene was without a shadow of excuse. They must have had a motive altogether independent of the value of the stock, and it is difficult to see how that motive could have been other than a corrupt one.

They were directors, it appears, in the railway company. Immediately upon the issue of the $350,000 of stock, they proceeded to make a transfer to John I. Blair, to induce him to become the president of the company, by giving him a controlling interest. Now if the company was insolvent and the stock worthless, as the defendants claim, the plan must, we think, have been to put a mere semblance of life into the company, and invite credit to which they knew it was not entitled. We know indeed that the company did invite credit to which it was not entitled, and that one of the persons who became creditors was this plaintiff.

We trust the motives of Traer and Greene were more honorable than they would seem to be upon the theory of the defendants' counsel. We are inclined to think that they regarded the stock as of some value, and hoped too that the company would be able to pay its debts, and that something would be saved to themselves beyond such debts. With this view it is only necessary for us to say that the stock which they agreed should be treated as fully paid cannot be so treated in a proceeding by creditors, under the statute, to enforce a liability for the unpaid balance. We think that the opin-

ion heretofore filed should not be adhered to, and that the judgment below must be affirmed.

Judgment affirmed.

ROTHROCK, C. J. and SEEVERS, J., dissenting.

DIXON v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

(64 Iowa, 531.)

Carrier — duty as to perishable property.

A railway company is not bound to transport perishable property to the exclusion of other general freight not perishable.*

ACTION on contract for transportation of freight. The opinion states the point. The plaintiff had judgment below.

M. A. Low, for appellant.

Boulton & McCoy, for appellee.

BECK, J. I. There was evidence tending to prove that the apples were delivered to defendant and loaded upon one of its cars at Oskaloosa on the 19th day of April, 1881, and were not delivered to the consignee, at Council Bluffs, until the 3d day of May following. When received by the consignee many of them were rotten, but when delivered to the defendant they were in good condition. The evidence tends to show further that the delay in the transportation of the fruit was the cause of its loss, and that had it been delivered in the usual time occupied in the transportation of property between the two cities, it would have been received by the consignee in good order. The cause of the delay arose from the prevalence of a flood in the Missouri river, which so overflowed the part of the city of Council Bluffs in which defendant's freight depot was located, that it could not be approached by cars. The evidence tends to show, that if the apples had been sent forward on the day they had been received by defendant, the car containing them would have reached Council Bluffs before the water had cut off approach to the depot.

II. As applicable to this evidence, the District Court gave to the jury an instruction in the following language:

* See *American Express Co.* v. *Smith* (33 Ohio St. 511), 31 Am. Rep. 561, note.

"2. It was the duty of the defendant, when the apples were loaded, to send them out on the first freight train going out on the route to Council Bluffs, if the exigencies of their freight traffic would permit, and if the apples were known to the defendant to be perishable freight, then it was its duty to transport them, even to the exclusion of other general freight not of a perishable nature."

The instruction in our opinion is erroneous. It may be, that if the exigencies of defendant's freight traffic had permitted the immediate transportation without delay, the diligence imposed by law would have required the apples to be sent by the very next train. There should be no delay without cause. Therefore if the demands of defendant's business, and the arrangement of its trains as to time, permitted the moving of the apples the same day they were received by defendant, it should have been done. This part of the instruction in this view is correct. The error rests in the part, which holds that defendant, if it knew the apples were perishable, was bound to transport them on the day of their receipt, even though other freight not of a perishable nature was delayed. This instruction required the apples to be removed the day of their receipt, and permits no excuse for delay. The demands of the business of defendant, the time of the starting of trains, contracts and obligations to first transport other property before received, in short all matter which might control defendant, and be considered as sufficient to determine its diligence are to be disregarded, and the defendant is to be held liable for negligence absolutely, without a ground of defense.

The law will recognize no rule operating with such hardship. The fact that the apples were perishable may have imposed an obligation for the exercise of care and diligence of a higher order to expedite their transportation. But it cannot be held that defendant was absolutely and unconditionally bound to move the apples forward on the day they were received, without regard to other matters to which we have referred. In support of these views, see *Swetland* v. *Boston & Albany Ry. Co.*, 102 Mass. 276; *Ballentine* v. *North Mo. Ry. Co.*, 40 Mo. 491; *Galena & Chicago U. R. Co.* v. *Rae*, 18 Ill. 488.

Other questions involved in the case, upon some of which we are not fully agreed, need not be considered, as for the error above pointed out, the judgment of the District Court must be reversed.

Judgment reversed.

MORGAN V. DES MOINES AND ST. LOUIS RAILWAY COMPANY.

(64 Iowa, 589.)

Railroad — track in street — damages — "abutting owners."

Owners of lots abutting upon streets only crossed by a railway are not entitled to damages for construction.

ASSESSMENT of damages for laying railway in street. The plaintiff had judgment below.

Parsons & Runnells, for appellant.

Barcroft, Gatch & McCaughan, for appellees.

ADAMS, J. These cases are submitted together as involving the same questions of law.

[Omitting minor points.]

The complaint in each of these cases arises out of the fact that the company's road crosses a street upon which the plaintiffs' lots abut. The plaintiffs rely upon section 464 of the Code.

It is to be observed however that the crossing is several feet distant from the lots, and the plaintiffs' rights are the same (except in regard to amount of damages sustained) as those of other persons who own lots abutting on the street several rods or blocks distant from the crossing.

The question presented must be determined by a construction of the statute above cited. The statute provides that municipal corporations "shall have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places, but no railway track can be thus located and laid down until after the injury to property abutting upon the street, alley or public place, upon which such railway track is proposed to be located and laid down, has been ascertained and compensated in the manner provided for taking private property for works of internal improvement in chapter 4 of title 10 of the Code of 1873."

The discussion in this case has taken a wide range. It is seldom that a question of mere construction is presented to us with more fullness of learning and suggestion. We do not however deem it

necessary to follow the counsel through all the considerations presented. We feel controlled by two or three of them, and these lie upon the surface, and can be stated in a few words.

The construction contended for by the plaintiffs would, in some cases where a railroad crosses all the streets of a city running in a certain direction, give a right of action to all the lot-owners in the city. This would be so where all the lots of the city abut on those streets. It is true that if the city were very large, and some of the lots very remote, the injury to some of the lots would be very small; but it would be impossible to say in any case that there was absolutely no injury. We think that the plaintiffs' construction would practically prevent a railroad from crossing any considerable number of streets, either for the purpose of entering a city as a terminus, or of passing through it. We are aware that it may be replied to this that it is better that it should be so than that individuals should sustain an injury without a remedy. But the law does not undertake to give a remedy for every injury. This is often so where the injury is slight and the damages not easily measured, and where an attempt to give a remedy would probably result in extensive litigation in matters of public concern.

The question presented is as to what was the legislative design; and in determining this we are not confined to a mere grammarian's view of the language used, but we may be governed somewhat by those larger considerations of policy which we must presume were present in the legislative mind.

When we come to examine the language of the statute we find in it very little tending to support the plaintiffs' view. It contemplates that the persons are entitled to damages whose lots abut upon the street upon which the track is laid. Whether a track can be said, within the meaning of the statute, to be laid upon a street which it merely crosses, we do not determine. The important question is as to what is meant by abutting upon the street upon which the track is laid. This question would afford no difficulty in a case where a track is laid along the whole street. In such a case, the owners of abutting lots along the whole street would of course be entitled to damages. But suppose the track is laid along a small portion of a street, as a distance of one block, while the street as a whole extends several blocks, would the owners of abutting lots along the whole street be entitled to damages? We think not. The words "the street," as used in the statute, mean, we

think, only so much in length as the company occupies with its track.

Similar language is used in the statute providing for assessing the cost of an improvement of a street upon abutting lots. Code, § 460. After providing that a city or town shall have power to improve a highway, the statute provides for an assessment upon the lots fronting on "such highway." No one has doubted, so far as we are aware, but that the words "such highway" mean simply the improved part. So in the case at bar, it appears to us that we are doing no violence to the words "the street," as used in the statute, to limit them to the incumbered part.

We are aware that actions have sometimes been maintained for damages sustained by reason of a nuisance in a street where the place of the nuisance was simply near the plaintiff's property, and not contiguous. But the decisions in those cases have no application to this. The plaintiffs are claiming under a statutory proceeding for the assessment of damages as substantially right of way damages.

So far as the case of the plaintiff Leas is concerned, in which the jury found for the defendant, and the court set the verdict aside, we have to say that it may be that for reasons pertaining to the proper trial of jury cases, the court, in setting aside the verdict, did not err. Strict regularity of practice might require that that case should be affirmed. But under the view which we have taken, an affirmance would be of no practical benefit to the plaintiff, and as the parties by agreement have submitted the cases together, and upon the theory, as we understand, that if we should hold that the plaintiffs were not, under the statute, entitled to damages, our decision would be a final disposition of both cases, we have concluded that the judgment in both cases should be reversed.

Judgment reversed.

WETMORE V. MELLINGER.

(54 Iowa, 741.)

Malicious prosecution — when lies.

An action of malicious prosecution does not lie unless there has been arrest of person or seizure of property.*

MALICIOUS PROSECUTION. The opinion states the case. The defendant had judgment below.

St. John & Williams and *Newman & Blake,* for appellants.

Poor & Baldwin and *Hale & Houston,* for appellees.

BECK, J. I. In an opinion, heretofore announced in this case, we held that the judgment of the District Court ought to be reversed. Upon the petition of defendants a rehearing was granted, and the cause was again argued and submitted. We have reached a conclusion upon the re-argument different from the decision announced in our former opinion, and we will now proceed to state the ground upon which it is based.

The petition alleges that defendants brought an action against plaintiff and his wife, charging in the petition that they two conspired and confederated together to defraud defendants, by representing to defendants under the assumed name of Baker, that they were the owners of certain lands in Poweshiek county, which defendants were induced to purchase of plaintiff and his wife, who in such assumed name executed to defendants a warranty deed therefor; that in an action by one Woodward, a deed purporting to be executed by him to the Bakers, under which they claimed title to the lands, was declared to be void, for the reason that it was forged and fraudulent, and that plaintiff herein and his wife well knew the condition of their title, and represented that they were the owners thereof for the purpose of cheating defendants, and of obtaining money by false and fraudulent pretenses, and did in that manner obtain the sum of $3,000 from defendants. It is further alleged that defendants herein sued out a writ of attachment in the suit

* *Contra, McCardle* v. *McGinley* (86 Ind. 538), 44 Am. Rep. 343, and note, 346.

brought by them, which was levied upon real estate owned by plaintiff's wife, and that defendants for a time prosecuted their action, but finally dismissed it at their own costs. Plaintiff, in his petition in this case, alleges that he was not indebted to defendants in any sum at the time their action was brought against him; that he was not guilty of the frauds therein charged, and that the action was commenced and prosecuted by defendants maliciously and without probable cause. The defendants in their answer admit the commencement of the suit, the issuing of the attachment, and that it was levied upon real estate owned by plaintiff's wife. There was no evidence showing, or tending to show, that the writ of attachment was levied upon any property owned by plaintiff. The wife of plaintiff does not join in this action.

We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action.

See 1 Am. Lead. Cas. 218, note to *Munn* v. *Dupont*, and cases there cited; *Mayer* v. *Walter*, 64 Penn. St. 289; *Kramer* v. *Stock*, 10 Watts, 115; *Bitz* v. *Meyer*, 40 N. J. L. 252; s. c., 29 Am. Rep. 233; *Eberly* v. *Rupp*, 90 Penn. St. 259; *Gorton* v. *Brown*, 27 Ill. 489; *Woodmansie* v. *Logan*, 2 N. J. L. 93; *Parker's Adm'rs* v. *Frambes*, 2 N. J. L. 156; *Potts* v. *Imlay*, 4 N. J. L. 330.

This doctrine is supported by the following considerations: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it.

It will be observed that the statement of the doctrine we have made extends it no further than to cases prosecuted in the usual

manner, where defendants suffer no special damages or grievance other than is endured by all defendants in suits brought upon like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious, or prosecuted maliciously and without probable cause. They are incidents of litigation. But if an action is so prosecuted as to entail unusual hardship upon the defendant, and subject him to special loss of property or of reputation, he ought to be compensated. So if his property be seized, or if he be subjected to arrest by an action maliciously prosecuted, the law secures to him a remedy. In the case at bar, the pleadings and evidence show no such special damages. No action could be prosecuted to recover money fraudulently obtained, in which the defendant would not suffer the very things for which plaintiff in this case seeks compensation in damages.

Counsel for plaintiff, in support of their position that the action may be maintained, though no arrest of defendant or seizure of property be had in the proceeding, alleged to have been maliciously prosecuted, cite *Green* v. *Cochran*, 43 Iowa, 544, and *Moffatt* v. *Fisher*, 47 Iowa, 473. In the first case, the action alleged to be malicious was a proceeding for bastardy, which under the statute, operated as a lien upon defendant's lands from the commencement. In the other case, the action which was the foundation of plaintiff's claim was forcible entry and detainer, and before final disposition thereof the defendant was ousted of possession of the land, whereon was a coal mine. In both instances the property of the respective defendants was reached by the proceedings. The facts of these cases are not within the rule we have stated, and do not support counsel's position.

[Minor points omitted.]

Judgment affirmed.

REED, J., took no part; SEEVERS, J., dissented.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

SCHUM v. PENNSYLVANIA RAILROAD COMPANY.

(107 Penn. St. 8.)

Railroad — negligence — contributory — presumption.

In action for a fatal injury at a street and railway crossing, it appeared that the deceased was approaching the crossing in a wagon, that the crossing was at an acute angle, and the view was so obstructed by trees and corn that a train could not be seen beyond ten yards from the track and then for only fifty yards. The train was moving forty miles an hour without giving warning. It did not appear that the deceased stopped or looked and listened. *Held*, that a nonsuit for contributory negligence was improper.*

ACTION of damages for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

Marriott Brosius, for plaintiff in error.

H. M. North and *E. D. North*, for defendant in error.

CLARK, J. On the 9th day of July, 1880, Philip Schum, accompanied by his wife, in a one-horse phæton, was driving southward on the road leading from the Lancaster and Middletown turnpike

* See *Tolman* v. *Syracuse, etc., R. Co.* (98 N. Y. 198), 50 Am. Rep. 649.

to Marietta, and about the hour of noon, while crossing the track of the Pennsylvania Railroad at Peiffers, near Salunga station, in Lancaster county, both were struck by the engine of the Niagara express train, moving westward, and were killed. This suit is brought by the children of Philip Schum to recover damages for his death.

The carriage road crosses the railroad from the north at an acute angle, and in the space north of the railroad and east of the carriage road was a field of corn; in the angle nearer the railroad was a willow tree twelve or fifteen feet high, and also smaller locust trees and bushes. According to the testimony on the part of plaintiffs, the view of the railroad was by these obstructions so obscured, that a traveller approaching the railroad from the north, on the carriage road, could not see the track toward the east until he arrived at a point about ten yards from the track, and then it was visible only for a distance of fifty yards east of the crossing. The railroad east of the crossing curved sharply to the north, behind a bank in the corn field, and was lost to view; at a distance of about one-third of a mile it crossed the turnpike at Salunga station. The train was moving at a very rapid rate of speed — perhaps forty miles an hour — and it does not appear that any signal of its approach was given.

When the testimony on the part of the plaintiffs was closed, a compulsory nonsuit was entered; a motion made to take off that nonsuit was refused, and this is the error assigned. The nonsuit was entered, not for want of evidence to establish negligence on part of the plaintiffs, but upon the ground that the same evidence which established negligence of the company proved negligence on part of the decedent contributing to the result.

What constitutes negligence, in a given exigency, is generally a question for the jury and not for the court. Negligence is want of ordinary care under the circumstances; the standard is therefore necessarily variable; no fixed rule of duty can be formed which can apply to all cases. A course of conduct justly regarded as resulting from the exercise of ordinary care, under some circumstances, would exhibit the grossest degree of negligence under other circumstances, the opportunity for deliberation and action, the degree of danger and many other considerations of a like nature affect the standard of care, which may be reasonably required in a particular case. When the standard shifts, not according to any certain rule,

but with the facts and circumstances developed at the trial, it cannot be determined by the court, but must be submitted to the jury.

"But," as was said in *McCully* v. *Clark*, 40 Penn. St. 406, "there are some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court." The same doctrine is announced in *Reeves* v. *Railroad Co.*, 30 Penn. St. 454; *P. R. Co.* v. *Zebe*, 33 Penn. St. 318; *P. R. Co.* v. *Ogier*, 35 Penn. St. 71; *Carroll* v. *P. R. Co.*, 2 Pennypacker, 158.

It has been held, that it is the duty of a traveller on the highway, when approaching its intersection with a railroad to look out for approaching trains, and that his failure so to do is not merely evidence of negligence, but negligence *per se*. *Railroad Co.* v. *Heileman*, 13 Wr. 60. Before attempting to cross the track of the defendant's road, it was the duty of the decedent, under any circumstances, and especially if the place was one of danger, or if the view was obstructed, to stop and look and listen for the locomotive; his failure to have performed that duty, which the law charged upon him, would have been negligence in itself.

However, as ruled in *Railroad Co.* v. *Weber*, 18 Penn. St. 157; s. c., 18 Am. Rep. 407, it is not incumbent on the plaintiffs, in order to recover damages for the death of Philip Schum, to show affirmatively, that before attempting to cross the track, he did stop and look and listen. The common-law presumption is, that every one does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar, no witness was called who saw the occurrence; there is no evidence whatever, whether in fact the decedent did stop and look and listen; the presumption is that he did; proof of that fact was no part of the plaintiff's case. The presumption is of fact, merely, and may be rebutted, but we are without evidence on the subject; all that we have is, that as he came upon the railroad, he was struck down by the locomotive.

It is argued however that at any point within ten yards from the crossing, on the carriage road, he might have seen the train for fifty yards, eastward along the track, as the track was plainly visible for that distance; that he was on level ground, in broad

daylight, without obstruction, when there was no train from the other direction, and that if he had looked, he would have seen what must have been right before his eyes; that if he did not look he was negligent, and if he did he was negligent, in attempting to cross in front of a train he could plainly see. This proposition is certainly plausible, and has been most ingeniously and forcibly presented by the learned counsel for the defendant in error, but we think it is not sound. Starting with the presumption that the decedent did look, we may of course conclude, that he saw the advancing train, but whether he saw it in time to avert the accident is merely a matter of inference or argument; from the moment the train was first visible, it was but two or three seconds until it was upon him; at the very moment the train came into view, he may have been in the act of crossing; the time intervening is too short to afford us any definite knowledge; we cannot precisely locate the phæton at the time of the first appearance of the train, so as to define the decedent's duty. If when the train came into his view, he had not yet committed himself to the act of crossing, and was in a place of safety, it was his duty to remain there until the train passed; to have attempted to cross then would have been an undoubted act of negligence. *Gerety* v. *Railroad Co.*, 81 Penn. St. 274; *Carroll* v. *Railroad Co.*, 2 Pennypacker, 159. The presumption is that he saw the train, but what was his situation with reference to it at the time he saw it, or in the exercise of diligence and reasonable care could have seen it? If he had stopped ten yards north of the track and looked for the train he could have seen it, provided it was within fifty yards of the crossing; he may have stopped there to look and listen and it may not have been visible. We have no right to assume that it was; from that point, at the rate he was going, if he moved steadily forward, he was six seconds from the track; the train, from the time it became visible, was but two or three seconds; we may infer therefore that from the point ten yards from the track he did not see it. Advancing toward the railroad, he may have fully undertaken the crossing before he saw the train; he may have reached a point in the passage which involved more danger to withdraw than to proceed. The relative position of the phæton and the train has been fixed by no one until the moment of the accident; and the whole subject of the decedent's duty is thus left open to conjecture and discussion. How therefore can the precise measure of the decedent's duty be

determined or defined by the court, when the facts upon which that duty is to be declared are unknown?

In the case of *Carroll* v. *Railroad Co.*, 2 Pennypacker, 159, it clearly appeared, from the evidence of the witnesses for the plaintiff, that they saw the train which struck the plaintiff, when it was at the eastern end of the depot, and that the plaintiff could have seen it, from where he said he stopped and looked; the relative position of the plaintiff and the train at the time was ascertained. This court therefore correctly held, that "it is in vain for a man to say he looked and listened, if in spite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive." We cannot declare the measure of duty incumbent upon Philip Schum until we know the circumstances in which he was placed; the mere fact of collision proves nothing, and the theory that the decedent, from a place of safety at the side of the track, might have seen along the track for a distance of fifty yards, in the direction of the approaching train, certainly did not justify the the court, under the circumstances of this case, in saying there was negligence on the part of the deceased as matter of law. A man may fairly be presumed to see what he can see, when it is his duty to look for it, but he cannot be presumed to see at a particular time what is not shown to have been visible at the time.

The speed of the train, which gave but two or three seconds for deliberation and action; the time reasonably required for the decedent to cross the track after he had fully committed himself to the act; the absence of the usual warning of the train's approach; the topography of the ground and the opportunities which the decedent had for self-protection, were considerations perhaps from which the jury might have drawn an inference or arrived at a conclusion; but it is very clear that the court was in error, in defining a duty without any proper determination of the facts upon which alone that duty can be declared.

We have carefully read the evidence in the cause and find nothing upon which to rest the remaining assignment of error; no such question appears to be raised on this record and we cannot consider it.

The judgment is reversed and a *procedendo* awarded.

Judgment reversed.

WINLACK v. GEIST.

(107 Penn. St. 207.)

Trespass — presumption of ownership of timber.

A., the tenant of timber land of B., cut timber on that land and also on adjoining land belonging to others, and sold it to C. B. replevied the timber and converted it to his own use. In trover by C. against B. therefor, *held*, that the *prima facie* presumption was that A. had the right to cut the timber on the adjoining property.

TROVER. The head-note and opinion show the case. The plaintiff had judgment below.

W. P. Jenks and *Conrad* and *Mundorff*, for plaintiff in error.

Jenks and *Clark*, for defendants in error.

GREEN, J. We are not able to say there was any error in the instructions given to the jury on the subject of the plaintiff's title. The only complaint that is made relates rather to the title of the plaintiffs' vendor than to that of the plaintiffs, except in its derivative character. The action is trover, and the plea was "not guilty," which of course required the plaintiffs to prove their title. This they did by showing purchase from another who had and delivered possession of the property, a timber raft, to the plaintiffs.

It appeared by the testimony that a portion of the timber was cut upon lands belonging to persons other than the vendor, and the defendant complains that the court permitted a recovery without requiring the plaintiffs to prove affirmatively, not only the title of the plaintiffs by purchase from their vendor, but also the full title of the vendor. It was proved that the vendor of the plaintiffs had cut and delivered the timber; there was no evidence showing that the persons upon whose lands the timber was cut, made any objection to the cutting, or any claim to the timber after it was cut, and the question was, what was the presumption in the absence of evidence. The learned judge of the court below said that the presumption was that the cutting was rightfully done and not wrongfully. We do not think this was error. It did not at all conflict with the right of the defendant to show title in an-

other than the plaintiffs. But he did not choose, or did not attempt to do this, and hence there was nothing in the case on this branch of the subject, except the presumptions that were applicable.

Of course there could not be a presumption of trespass, of wrong-doing. On the contrary, the mere fact of cutting without objection or adverse claim by the owners of the land, after several years had elapsed, was some evidence in addition to the natural presumption that persons act rightfully rather than wrongfully, in support of the vendor's title. If such a presumption may not be made in such circumstances, it would follow that there could be no recovery, which means practically that a presumption of wrong-doing must be made, and thus what might be a perfectly good title, against all the world, be lost in favor of one who had no pretense of title. The plaintiffs proved a perfect *prima facie* title by showing a purchase and payment for personal property from the person in possession of it. In all ordinary cases this is sufficient, because as a rule the possession of personal property is evidence of its ownership. We think this is all that is required in actions of trover, unless the plaintiffs' title is directly challenged by the defense. We find the rule thus stated in 2 Troub. & Haly's Prac., § 1563: "So possession with assertion of title, or even possession alone, such for instance, as the finder of a chattel has, gives the possessor such a property as will enable him to maintain this action against a wrong-doer, for possession is *prima facie* evidence of property; but as the action is founded on property, and not merely on possession, it is still competent for the defendant to show a paramount title in a third person." Undoubtedly in any ordinary case of trover, where the subject of the action is a specific chattel, if the plaintiff proves that he bought and paid for it from one having it in possession, he has made out a *prima facie* case and one upon which he can recover, unless there is evidence impeaching his title. Perhaps the presumption is not quite so strong where the property consists of timber cut from land owned by another than the plaintiff's vendor. But we cannot say there must be, in such a case, a presumption that the cutting was done without right. On the contrary, we think with the learned court below, that when a man does an act, the presumption, in the absence of evidence otherwise, is that he acted rightfully and not wrongfully. This does the defendant no harm. He is perfectly at liberty to disprove the presumption, and show by

any sufficient testimony that it does not apply in the given case. Nor do we see any error in the answer to the defendants' fourth point. It is only the impossibility of distinguishing goods intermixed with others, that transfers the title to the whole to the one who is innocent of the intermixture. But if they may be distinguished, the transfer of title does not take place, and of course whoever asserts such a title must prove it. The court said nothing more than this.

Judgment affirmed.

STOCKWELL v. MCHENRY.

(107 Penn. St. 237.)

Deed — recording — indexing.

An index is not essential to the registration of a deed.*

EJECTMENT. The opinion states the case.

R. Brown, for plaintiff in error.

Gordon & Corbet, for defendant in error.

CLARK, J. The Forest County Oil and Mining Company was incorporated under the act of 21st April, 1854; the certificate was formed on the 8th March, 1865, on that day it was signed and acknowledged by the corporators; on the 10th March, 1865, it was certified by the attorney-general, and on the 26th March, 1865, it was recorded in the office for recording of deeds, etc., in the county of Forest where the business of the company was to be conducted. Letters-patent were issued by the governor on 11th April, 1865, as provided by the act of 7th May, 1855. The lands in dispute are embraced in the certificate, and by the provisions of the act of 1854, constituted part of the common stock of the company, in which the shares for all legal purposes whatsoever are deemed personal estate.

On the 12th August, 1875, Roxalina McHenry, executrix of A. R. McHenry, deceased, obtained a judgment against the company, and upon executions thereon the lands were sold; the plaintiff's title is derived through the sheriff's sale. On the 29th July, 1874,

* See 45 Am. Rep. 189, note; 30 id. 250.

Alexander McAndrew and Samuel Warren, two of the corporators, upon a good and valuable consideration executed a mortgage on what they recite as their undivided interest in the lands in dispute to William H. Stockwell, and the defendant's title is derived through a sale on this mortgage.

The court below was certainly correct in concluding that the legal effect of the incorporation was to vest in the company the title to all the lands in the certificate described, without any further conveyance or assignment. By the subsequent act of 27th March, 1865, this was enacted to be the true intent and meaning of the original statute; but this amendatory provision was in this respect merely declaratory of its obvious meaning, and was perhaps intended to dissipate any doubts which might exist on that subject. A careful study of the statute of 1854 will, we think, lead to this conclusion.

The recorder of deeds in Forest county however, in the recording of this certificate, did not enter the names of the parties signing it among the grantors in the index of deeds and conveyances in his office, nor was the ownership of the land otherwise manifested by actual occupancy, improvement or cultivation. The question therefore arises, whether the record of the articles of association transferring the title from Alexander McAndrew and Samuel Warren to the Forest County Oil and Mining Company, not having been thus indexed, was constructive notice to the mortgagee, and those claiming under him; this was in substance the point reserved.

By the act of 27th March, 1865, the recorder of deeds is required so to index instruments of this character, that the names of the parties signing them shall appear among the grantors, in the index of deeds and conveyances; by the later statute of 18th March, 1875, he is required to keep not only a direct but an *adsectum* index also, and it is provided that the entry of recorded deeds and mortgages in such indexes shall be notice to all persons of the recording of the same. This certificate however was recorded on the 26th March, 1865, which was prior to the passage of either of the statutes referred to, and as they are not retroactive in effect, they can have no application to the case under consideration.

Assuming therefore that the certificate was in the nature of a conveyance, and that a proper indexing required that the names of the corporators contributing the land should be placed with the grantors, it does not follow that the failure of the recorder so to do invalidated the record. Prior to the act of 18th March, 1875, at

least it was well settled that a deed was in contemplation of law recorded when it was left in the recorder's office, and put upon the entry-book for that purpose.

The duty of the recorder was to record it, and the responsibility rested upon him for any default in the proper discharge of that duty; the consequences of his default could not be visited upon the owner, who had done all that the law required, in depositing the deed in the office for that purpose. A different doctrine was perhaps declared in *Luch's Appeal*, 44 Penn. St. 519, where it was held that mortgages must be recorded in a "mortgage-book," and that they are not properly recorded in any other book, where they can not be found by means of a "mortgage index;" but that case was expressly overruled in *Glading* v. *Frick*, 88 Penn. St. 460, where it was said by PAXSON, J., "We feel ourselves constrained to return to the rule laid down by Chief Justice GIBSON in *McLanahan* v. *Reeside*, 9 Watts, 511. 'It is indeed,' says the chief justice, 'of no account that the conveyance and the articles were not recorded in the book set aside for mortgages; the keeping of such a book is an arrangement to promote the convenience of the officer by contracting the surface over which he is to search for a particular thing; he is bound to furnish precise information, get it as he may, of every registry in his office, whether made in the right place or not.'" *Clader* v. *Thomas*, 89 Penn. St. 343, and *Paige* v. *Wheeler*, 92 Penn. St. 282, are to the same effect.

The remark of Chief Justice WOODWARD, in *Speer* v. *Evans*, 47 Penn. St. 141, that the index is an indispensable part of the record, is not to be regarded as an adjudication to that extent; that case turned upon the question of actual notice. *Schell* v. *Stein*, 76 Penn. St. 398; s. c., 18 Am. Rep. 416. No duty rested upon the Forest County Oil and Mining Company to supervise the action of the recorder, to see that he made the record and indexed the conveyance. *Brown & Wood's Appeal*, 3 W. N. C. 35; *Wyoming Bank's Appeal*, 11 W. N. C. 567. Constructive notice of the conveyance must therefore be imputed to the holder of the Stockwell mortgage, as well as to those claiming under it; that notice being the implication which the law attaches to the registration of the certificate.

We are of opinion therefore that the learned court was clearly right in entering judgment for the plaintiff on the question reserved.

The judgment is therefore affirmed.

Judgment affirmed.

Baker's Appeal.

(107 Penn. St. 361.)

Will — reference to extraneous writing.

A will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A., on the third page, numbered "4th," certain words describing the property devised were erased, and the words "See next page" were there interlined. On the fourth page was an unsigned clause, numbered "4th," making a bequest to A., and additional bequests to others. The draftsman testified that the erasure and interlineation and the writing on the fourth page were made by him by testator's direction, prior to the signing, and he identified the clause on the fourth page as the subject of reference on the third page. *Held*, that the clause on the fourth page was part of the will.

SUFFICIENTLY reported, 49 Am. Rep. 454.

City of Allegheny v. Campbell.

(107 Penn. St. 533.)

Interest — on unliquidated damages.

In an action of damages for destruction of property by negligence, interest on the damages from the time of destruction is allowable.*

ACTION for negligent destruction of personal property. The opinion states the point. The plaintiff had judgment below.

W. B. Rodgers, city solicitor, for plaintiff in error.

George D. Riddle and *John Barton*, for defendants in error.

Paxson, J. [Omitting other points.] It was not controverted at the trial below that the plaintiffs occupied a portion of the wharf belonging to the city of Allegheny, nor that they paid rent or wharfage therefor, nor that at the time of the accident they had a certain amount of property at their wharf, and that a rise in the

* See 31 Am. Rep. 494.

river brought down a large amount of ice, and carried away and destroyed a large amount of plaintiffs' property.

The fifth assignment alleges that the court below erred in instructing the jury that if they found for the plaintiff they should allow interest. We see no error in this. *Weir* v. *County of Allegheny*, 95 Penn. St. 415, is not in point. That was a suit against the county to recover damages for the destruction of the plaintiff's property by rioters, and it was held that as the suit was brought under a special statute which gave no interest, none could be recovered. It is laid down by Mr. Sedgwick, in his Measure of Damages, vol. 2, p. 158, that interest may be recovered "where it can be claimed as a right, either because there is an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay, or for money or property improperly withheld." In the case in hand interest was clearly recoverable as a part of the damages. Without the addition of interest on the value of the property from the time it was destroyed, the remedy of the plaintiffs would be inadequate. In the case of *Pennsylvania Railroad Co.* v. *Patterson*, 73 Penn. St. 491, there was a recovery of interest under analogous circumstances, and although error was not assigned to such recovery, the omission is significant as to the state of the law upon this point. We are of opinion that interest was properly allowed.

Judgment affirmed.

COLLINS' APPEAL.

(107 Penn. St. 590.)

Pledge — equitable.

For the purpose of borrowing money from B., to form a limited partnership, A. executed an instrument pledging to B. all his interest in the limited partnership of A. and C., A. to remain in possession, but to make an assignment of his interest on demand. The proposed partnership was formed, but under another name, including additional parties. B. lent the money to A., who contributed it to the capital of the partnership. No assignment was ever made nor demanded. A. died insolvent, but upon the subsequent winding up of the partnership a balance of profits remained, and A.'s share thereof was paid to his executor. Upon distribution of said fund, *held*, that B. was entitled to receive the amount of the pledge to the exclusion of a general creditor of A.

Collins' Appeal.

APPEAL from decree of distribution in Orphans' Court. The opinion states the case.

C. Stuart Patterson and *R. C. McMurtrie*, for appellant.

E. Hunn Hanson and *Wm. C. Hannis*, for appellees.

GREEN, J. If the instrument of November 23, 1875, constituted a valid equitable pledge of the interest which produced the fund for distribution, the other contentions in the case become immaterial and will not require consideration. Of course there is no pretense of a legal lien, but a pledge in equity, available to the pledgee, does not depend upon the considerations which are requisite to the creation of a lien at law. The chief objection to the operation of the instrument in question as a pledge is that "the thing proposed to be pledged, that is, Hulse's interest in a partnership between him and Alexander W. Wister, never came into existence," and therefore there was nothing upon which the paper could operate. Designated with precision, and by its legal name, the interest which produced the fund was a one-half interest in the capital stock of a limited partnership called the Centennial Rolling Chair Company, limited. The partnership was organized under the act of June 2, 1874, and the persons who composed it were Charles F. Hulse, Thomas C. Rice, Alexander W. Wister, William B. Rodgers, Jr., Langhorne Wister and Isaac Collins. The capital stock was $25,000, of which Charles F. Hulse held $12,500, and the others, different sums aggregating $12,500. The agreement creating the partnership was dated, signed and acknowledged on February 9, 1876, and recorded on the 11th, two days later. The certificate of organization recites that the parties, naming them all, "have entered into a limited partnership association for the business of furnishing for hire, rolling chairs for the accommodation and conveyance of persons within the grounds and buildings of the Centennial Exhibition, under and by virtue of the act of Assembly of the Commonwealth of Pennsylvania, approved the second day of June, A. D. 1874."

The fifth clause of the certificate is in the following words: "The general nature and character of the business intended to be transacted by the said partnership association is the furnishing for hire of rolling chairs for the accommodation and conveyance of persons

within the grounds and buildings of the Centennial Exhibition, and the office of the said association is to be located in the city of Philadelphia." There is nothing in the other parts of the certificate which conflicts in any manner with the foregoing description of the purpose, character and object of the undertaking or enterprise in which the parties to it engaged.

The paper of November 23, 1875, thus describes the subject of the pledge: "Whereas Frederick Collins has agreed to advance Charles F. Hulse $10,000, which said Hulse proposes to use as capital in an undertaking of himself and Alexander W. Wister, to furnish rolling chairs for the Centennial Exhibition; and the said Hulse for the purpose of securing the said Collins for the said loan and the repayment of the same with interest, hereby pledges to the said Collins all his the said Hulse's interest in the said partnership 'limited,' of Hulse and Wister; and he further agrees to assign and deliver possession of all said interest he holds in the partnership of Hulse & Wister, at any time before the repayment of said loan to said Collins that the said Collins may elect to demand such possession, when the agreement made by him, the said Hulse, for the proper conducting of the business aforesaid, shall be assumed and executed by the said Collins, and after the repayment of said loan and interest and the necessary expenses attendant therefor, the excess of receipts for said business shall be paid to Elizabeth D. Hulse, the wife of the said Charles F. Hulse." This paper is very defectively and inaccurately drawn, and it is owing to this fact that the present litigation has arisen. There was no partnership of Hulse & Wister, or of them with other persons, in existence at the time the instrument was executed, yet in the second and third clauses of the paper a partnership is referred to as already in existence, and in the definite name of Hulse & Wister. It is this confusion of reference that occasions the dispute as to the meaning of the whole instrument. To understand just what it was that the parties were negotiating about, we must refer to the recital in which the very subject-matter of the joint enterprise which was proposed to be established or engaged in is more accurately described. In substance it is this: Collins agrees to lend Hulse $10,000, to be used by the latter as capital in an undertaking of himself and Wister to furnish rolling chairs for the Centennial Exhibition. Now this "undertaking" had not then been brought into existence, but that is precisely what was subseqently done by the organization of the limited partnership.

Hulse and Wister did thereby engage "in an undertaking" to furnish rolling chairs for the Centennial Exhibition. It is true others joined them in the enterprise, but that circumstance does not alter the fact that Hulse and Wister engaged in it, and it is entirely immaterial, as the interests of the other parties do not affect any present question between these parties. If Hulse and Wister had alone established the partnership, and the others had subsequently acquired their interests, it could hardly be pretended that the partnership referred to in the paper has never come into existence, yet whether the interests of the other parties were acquired originally or subsequently can certainly make no difference. At least three persons would be absolutely requisite to the creation of any "limited" partnership under the act of 1874, and as that kind of a partnership appears to have been contemplated by the paper, other persons than Hulse and Wister must necessarily have joined therein. Moreover there is no express engagement or necessary inference that other persons were not to be interested in the proposed partnership, and the fact that there were such is therefore not inconsistent with the actual intent of the parties in their description of the subject-matter of the pledge. It seems to us the only material question in the controversy on this branch of the case is as to the identity of the subject-matter of the pledge with the description of it contained in the paper. It is not at all disputed that the fund for distribution was the sole product of Hulse's interest in the capital of "an undertaking" "to furnish rolling chairs for the Centennial Exhibition." It is equally certain that Hulse and A. W. Wister were parties to that undertaking. It is not pretended there was any other undertaking of this nature in which these two persons were interested, and it is asserted and not denied that the very sum of $10,000, which Collins loaned to Hulse, was traced by the testimony directly into this limited partnership, and constituted its capital to that extent. The actual sum loaned was even more, $12,410, the whole of which went into the partnership.

Now the material part of the description of the subject of the pledge, contained in the paper of November 23, 1875, is "capital in an undertaking to furnish rolling chairs for the Centennial Exhibition." This is a description of the thing itself, and it is literally complied with by the subject-matter which produced the fund in court. The subsequent language is rather of reference than description, thus: "The said Hulse's interest in the said partnership

'limited' of Hulse & Wister." There was no "partnership limited" previously described, and the only antecedent of the whole phrase is the "undertaking" to furnish rolling chairs. It is perfectly plain to us that the second phrase is a mere careless and inartistic reference to the actual subject more accurately described in the first sentence. The two are not necessarily inconsistent. They were intended to relate to and indicate the same thing. Moreover the parties may then have supposed that the partnership when formed would be named "Hulse & Wister," and therefore referred to it by that name, and yet when it came to be established may have decided to give it another name. If the actual partnership subsequently created was the same one which the parties in reality contemplated, and provided for, in executing the written pledge, it is certainly unimportant whether the name of it, which at the best was but arbitrary, remained the same or was changed. Had the words "his, the said Hulse's, interest in the said partnership limited of Hulse & Wister," been the only words in the instrument describing the subject of the pledge, the case would have been different. But such is not the fact, and we read the instrument in accord with the manifest intent of the parties when we hold that it was a pledge of Hulse's interest in the capital of limited partnership, intended to be formed thereafter, and actually so formed, the purpose of which was to furnish rolling chairs for the Centennial Exhibition. This being so, the paper must have the same legal effect as if it had contained an accurate description of the subject of the pledge, that subject having produced the fund for distribution.

This raises the only remaining question, to-wit, whether a valid and binding pledge can be given of the interest of the pledgor, in a partnership to be subsequently created, so as to secure to the pledgee a priority of a lien as against other unsecured creditors. In such a case the subject of the pledge is necessarily incapable of manual possession or of actual delivery. It is in no sense a specific chattel, and even as a chose in action it cannot be enjoyed in possession until after the partnership has been closed, the debts paid, the rights of the partners as between themselves adjusted, and the resulting amount due the pledgor ascertained. The interest comes into existence as soon as the partnership is created, but it is an uncertain quantity until dissolution and final settlement. It is intangible as a *res*. It may be something, or it may be nothing. But in legal and in equitable contemplation it is an entity which may

be subject to any kind of contract relation which is possible to such forms of property. Partnership interests are of infinite variety and of enormous extent and value. In the business world they are the subjects of daily transactions in all civilized societies. Within the limitations which arise out of their peculiar characteristics they may be dealt with as other personal property. One objection to the validity of the pledge in the present case is that the interest in question had no existence at the date of the instrument creating the pledge, and for this reason also there was nothing upon which it could operate. Indeed that was the ground upon which the learned court below decided the case against the appellant. But in other forms of property that objection does not avail. In the case of *Railroad Co.* v. *Woelpper*, 64 Penn. St. 366, SHARSWOOD, J., said: "But it is objected that no person, natural or artificial, can grant what he does not possess or own at the time of the grant. *Qui non habet, ille non det.* Yet even at law this rule is not without some qualifications. A man may grant the future accretions or increase of any subject which he owns at the time of the grant, as all the wool which shall grow on his sheep for a term of years." * * * "But it is not necessary to maintain that the rolling stock and equipments of a railroad are part of its accretions and fixtures, so as to make the transfer good at law. It is unquestionably good in equity. Contingent estates and interests, though not assignable at law, are assignable in equity; and they may also be the subject of a contract, which when made for valuable consideration, will be specifically enforced when the event happens." * * * "It is a plain corollary from these principles that a court of equity will treat a mortgage of property to be subsequently acquired, whether it be real or personal, as a binding contract, which attaches to the thing when acquired. Equity considers that as actually done which a chancellor would decree to be done." Judge Story, in his work on Equity Jurisprudence, section 1039, says: "To make an assignment valid at law the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments not only of choses in action and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not indeed as a present positive transfer, operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing

comes *in esse.*" In the case *In re Ship Warre*, 8 Price, 269, an assignment of the freight and earnings of a voyage yet to be made, was upheld in equity. Lord ELDON said: "I am not aware that it has ever been ruled in equity, and I apprehend that it is has not, that the freight of a voyage that is intended to be made, although not an existing voyage, may not be assigned in equity." In *Mitchell* v. *Winslow*, 2 Story, 631, the court sustained the validity of a mortgage of all tools and machinery which might be purchased, and all cutlery stock which might be manufactured, or purchased, during a period of four years from the date of the mortgage. In the case of *Holroyd* v. *Marshall*, 10 H. L. Cas. 191, WESTBURY, L. C., said: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterward becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor and mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract." Lord CHELMSFORD said: "At law property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law, although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it."

These principles have been recognized and enforced in this court: In *McWilliams* v. *Nisly*, 2 S. & R. 518, GIBSON, J., said: "In equity a grantor conveying land for which he has no title at the time, shall be considered a trustee for the grantee, in case at any time afterward he should acquire title." In *Chew* v. *Barnet*, 11 S. & R. 391. it was said: "The facts presented constitute the ordinary case of a conveyance before the grantor has acquired the title, in which the conveyance operates as an agreement to convey, which when the title has been subsequently acquired may be enforced in chancery." In *Bayler* v. *Commonwealth*, 40 Penn. St. 43, STRONG, J., says: "But

though a conveyance of an expectancy as such is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration. This has often been decided."

It is unnecessary to prolong these citations. They prove clearly that the existence of the subject of the pledge at the time the contract of pledge is made is not at all necessary. If it comes into existence afterward, it is affected in equity at once by the lien stipulated for. There is no doubt that the principles illustrated by the foregoing decisions are applicable to cases of sales, absolute assignments and mortgages. But owing to the peculiar character of the instrument executed by Hulse in this case, we have had much doubt whether they were applicable to this particular contract.

The difficulty has been that while there is a distinct pledge, in terms of present operation, of the interest of Hulse in the contemplated undertaking and partnership, there is no actual assignment, and no provision for an absolute assignment. An assignment is provided for, and we could readily hold it to be an equitable assignment if it were not for the fact that the obligation of Hulse to make it only arose after demand made on the part of Collins, and no such demand was ever made. The obligation to assign therefore not having arisen under the express terms of the contract, and there being no actual assignment, and no absolute or unqualified agreement to assign contained in the instrument, we find what seems to us an insuperable difficulty, under the authorities, in the way of treating this paper as an equitable assignment of Hulse's interest in the proposed partnership. We think also it is not practicable to regard the indebtedness of Hulse to George D. Parrish's estate as a partnership debt. Whatever might have been its quality in this respect prior to the decree finally made in the litigation for the settlement of the afairs of the firm of Price, Parrish & Co., when that decree was made it was a several as well as a joint judgment against Hulse's executor. We do not see how we can go behind that decree in this case, to inquire into the original character of the indebtedness or into the reasons for making it several as well as joint. It is the final judgment of a court of competent jurisdiction having the parties and the cause before it.

The question then recurs, can the lien of the appellant be enforced as a technical pledge of Hulse's interest in the partnership? His equity is very great. The testimony proves distinctly that the

money loaned by him to Hulse went directly into the partnership, and formed part of its capital, and therefore was the means, the sole means, of producing the fund to be now distributed. At the time it was loaned it was upon a distinct and absolute pledge of Hulse's interest in terms of present operation. It could not operate immediately, because the subject of the pledge was not then in existence, but as we have heretofore seen, that circumstance is in equity immaterial, and it became operative as soon as the interest was created. It is effective therefore so far as such a pledge of such a subject can be effective. Is it sufficiently so to give the appellant the money which is the product of the interest pledged as against the appellee? The appellee is not a purchaser. He is but a creditor, and he has not the rights which could be asserted by a purchaser for value and without notice. He is not a creditor subsequent to the creation of the partnership, but anterior thereto, and therefore cannot assert that his credit was given on the faith of the apparent ownership of this interest by Hulse. He is not a creditor who had levied on the interest of Hulse and sold it upon execution and purchased it at such sale. He is but a general creditor of Hulse without any equity, except such as all creditors of that class have upon the assets of their debtor. Notwithstanding all this he is entitled to share this fund *pro rata* with the appellant, unless the latter can sustain his claim of lien upon the fund.

The only difficulty that lies in the appellant's way in this respect grows out of the consideration that possession of the subject of the pledge is an almost universal requirement in the law of pledge, to perfect the pledgee's title. It may be dispensed with in certain cases, but the current of the authorities is that in such cases there must be a substitute for it in the way of a transfer of the title in such manner that the pledgee can exercise a right of possession without any further act of the pledgor. Formerly no distinction was taken between a pledge and a mortgage of chattels. They were both regarded as a security for a debt, and the title of the pledgee was considered as substantially the same in both cases. In the case of *Cortelyou* v. *Lansing*, 2 Cai. Cas. 200, Chancellor KENT points out an important distinction which was then but recently observed, to-wit, that in a pledge the general property remains with the pledgor, and only a special property passes to the pledgee, and hence on a failure to redeem. the pledgee has no right to sell or appropriate the pledge, while a mortgage of a chattel passes the absolute

title subject to a defeasance, and upon a failure to redeem, the title of the pledgee becomes perfect. Not stopping to inquire whether this would be the law in Pennsylvania at this day, it is nevertheless the fact that a mortgage, in its ordinary form, contains an absolute transfer or assignment of the title, with a provision for a defeasance upon payment of the debt, added. In this respect therefore, there being an actual assignment of the title, there is sufficient, in equity, to create an available lien in the mortgagee. Nothing further remains to be done by the mortgagor to perfect the mortgagee's title. But in the case of a bare pledge, without an assignment, or at least an unqualified agreement to assign, the title of the pledgee seems to be defective without a further act of the pledgor. The distinction is doubtless refined, but it appears to be substantial.

There is however a class of cases in which it is disregarded. They are cases in which the possession of the pledge is, by the agreement of the parties, to remain with the pledgor. It is held that as the pledgor is bound, notwithstanding this provision of the contract, so all are bound who claim under him, except purchasers for value and without notice. The doctrine has been applied in the case of specific chattels, and it would apply with much more force in the case of expectancies or intangible interests.

Thus in the case of *Reeves* v. *Capper*, 5 Bing. N. C. 136, one Wilson, the captain of a ship, pledged his chronometer, which was then in the possession of the makers, to the Messrs. Capper, the defendants, who were the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during the voyage on which he was about to depart; after the voyage he placed it at the makers, and there pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to the defendants, agreed to hold it; the money advanced by the defendants not having been repaid, it was held that the property in the instrument was in the defendants. In point of fact the chronometer was delivered by the makers to the defendants' clerk, who immediately redelivered it to the pledgor, and it was contended by the plaintiff that the defendants, having parted with their possession, had lost their lien, but it was held that as this was done in accordance with the terms of the contract, the lien was not lost. For this purpose the court said that Wilson, the pledgor, could be regarded as the servant of the pledgees, and that his possession was their possession. But substantially it was because the possession

was in accordance with the terms of the contract, that the lien was enforced even against another *bona fide* creditor who had loaned his money upon the pledge of the same chattel, while in the control of the pledgor, and without notice of the previous pledge. In the case of *Meyerstein* v. *Barber*, L. R., 2 C. P. 38, WILLES, J., said: "But in order to complete the pledge it is not necessary that there should be an actual delivery of the chattel to the pledgee; it is sufficient, as was decided in *Reeves* v. *Capper*, 5 Bing. N. C. 136 (35 E. C. L. R.); 6 Scott, 877, and the other cases to which reference was made, in the course of the argument, if there be a constructive delivery. It is not necessary that the subject of the pledge should actually pass from the hands of the pledgor to those of the pledgee. The property in the goods may pass, even though they remain in the possession of the pledgor, provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee. In the case of *Fletcher* v. *Morey*, 2 Story, 555, James Read & Co., of Boston, agreed with Fletcher, Alexander & Co., of London, by a written agreement, that the latter firm should honor bills drawn on them in payment of goods purchased for Read & Co., and to secure Fletcher, Alexander & Co, it was agreed that all the property purchased by means of the credit, and the proceeds thereof, "and the policies of insurance thereon, together with the bills of lading, are hereby pledged and hypothecated to them as collateral security for the payment as above promised, and held subject to their order on demand, with authority to take possession and dispose of the same at discretion for their security or reimbursement." Goods were purchased for Read & Co., and bills drawn on and accepted by Fletcher & Co. to pay for them. Reed & Co. became bankrupt, some of the goods came to the assignee in bankruptcy and some to Read & Co., for which the bills of lading were received by them and indorsed to the plaintiffs, who filed a bill against the assignee to have a lien declared in their favor against all the goods and the proceeds of such as were sold. The court sustained the bill, holding that the plaintiffs were entitled to recover on their contract of pledge, although as to some of the goods they never had any kind of possession of them, and as to others to which they were entitled to possession by virtue of the bills of lading, they had parted with it. STORY, J., said on page 565, "This then being the established principle, the first question which arises in the case is, whether there is any equitable lien or

right, or claim, under the agreement which ought to be enforced specifically in equity against the shipments made to and for Messrs. Read & Co., or the proceeds thereof, so far as they can be distinctly traced in the hands of the assignee, and upon this point I entertain no doubt whatever. In equity there is no difficulty in enforcing a lien, or any other equitable claim, constituting a charge *in rem*, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself and his personal representatives, and against any persons claiming under him voluntarily or with notice, and against assignees in bankruptcy, who are treated as volunteers; for every such agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts." * * * "So that as a matter of trust directly growing out of, and provided for, by contract, the present case falls directly within the principle above stated. The goods and the proceeds thereof are expressly by the agreement of the parties, 'pledged and hypothecated,' as collateral security for the advances." * * * "But it is said that the agreement, if enforced, will operate as a fraud upon the creditors of Reed & Co. under their bankruptcy, and indeed that an agreement of this sort, so far as respects creditors, is void as against the policy of the law, and in derogation of the rights of creditors. Now it is not pretended, nor even suggested, that any fraud was in fact contemplated by the parties or any of them, upon the creditors. The transaction was *bona fide* for a valuable consideration and for future advances, to promote the commercial business of the firm of Read & Co. and not to withdraw any of their existing funds from their creditors. * * * How then it is against the policy of the law I confess myself unable to perceive, unless we are prepared to say, that taking collateral security for advances upon existing or future property, on the part of a creditor, without taking possession of the property at the same time, or when it comes *in esse*, is *per se* fraudulent. Possession is ordinarily indispensable at the common law to support a lien, but even at the common law it is not absolutely indispensable in all cases. This is shown by the recent case of *Dodsley* v. *Varley*, 12 Ad. and Ell. 632, where goods had been sold and deposited in the warehouse of a third person for the vendee; but still it was understood between the parties that the vendee was not to remove them until payment therefor, and it was held by the

court that although the warehouse must be considered as the vendee's warehouse, and he in the actual possession of the goods, yet 'consistently with this, the vendor had, not what is commonly called a lien determinable upon possession, but a special interest, sometimes but improperly called a lien, growing out of the original ownership, independent of the actual possession, and consistent with the property being in the vendee.' What is this but allowing the existence of an equitable lien, notwithstanding the possession of the goods is parted with, good between the parties, and good as to all persons not claiming under the vendee as *bona fide* purchasers for a valuable consideration without notice? But I take it to be clear that not only liens but mortgages of personal property are perfectly good and supportable between the parties, and against creditors, where there is no fraudulent intent and the possession remains in the owner or mortgagor of the property, and is consistent with the deed and the arrangements made between the parties." Judge STORY concludes his view of the case thus: "So that the possession of the property by Messrs. Read & Co. in the present case is not in my judgment a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of their creditors, and therefore the agreement is binding and valid to give a lien or equitable charge upon the property in the hands of the assignee, fit to be enforced in the present suit." In other words, although this was a case of a pledge of personal chattels, wherein in all ordinary cases, possession by the pledgee is indispensable to the validity of the pledge, and the title to and possession of the goods agreed to be pledged had passed to the pledgor, the mere agreement for such possession sufficed to protect the lien, and was good against the parties and the general creditors of the pledgor. The same doctrine was held and applied in the case of *Mitchell* v. *Winslow*, 2 Story, 630, in which Judge STORY, on p. 644, said: "It seems to me a clear result of all the authorities that wherever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not; or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy." He then proceeds to answer the

no difficulty in reading this paper as an actual present pledge by Hulse to Collins of a partnership interest which he was to acquire in the future with the money loaned him by Collins; that Hulse was to be in possession of the interest until such time as Collins might demand an assignment of it, and upon such demand being made. Hulse was to make the assignment, and "to deliver possession of all said interest" to Collins. This being so, the interest was subject to the operation of the pledge in equity from the moment it came into existence. It was binding upon Hulse, notwithstanding his possession, because such was his contract, and for that reason it is binding upon all claiming under him except purchasers for value and without notice. The appellees' testator was not such a person, but a mere general creditor, whose right is inferior and subordinate to that of the appellant.

We hold therefore that the appellant is entitled to take out of the fund for distribution the sum of $10,000, with interest from the date of the loan, by virtue of his equitable lien upon Hulse's partnership interest, the proceeds of which constitute the fund. As to the remaining $2,410 of his claim he is an unsecured creditor, and can only take a dividend *pro rata* with the appellees and other creditors, if there are any.

Decree reversed and record remitted, with directions to the court below to distribute the fund in the hands of the accountant in accordance with the foregoing opinion, the costs of this appeal to be paid by the appellees.

Decree reversed.

CLARK, J., dissented.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

PERRY v. HOUSE OF REFUGE.

(63 Md. 20.)

Action—assault by officer of State charitable institution.

An action does not lie against a State house of refuge for an assault on an inmate by an officer thereof.*

ACTION for assault. The opinion states the case. The defendant had judgment below.

Robert Biggs and *R. R. Boarman*, for appellant.

William Reynolds, for appellee.

YELLOTT, J. The appellant instituted an action in the Circuit Court for Baltimore county against the appellee for the recovery of damages; the plaintiff alleging in his declaration that on several occasions he was maliciously assaulted and beaten by the officers and agents of the defendant, a corporation, while in the regular course of their employment. It is apparent, from the evidence, that the appellant was beaten by teachers employed in the insti-

*See *Clodfelter* v. *State* (86 N. C. 51), 41 Am. Rep. 440, and note, 442; *Glavin* v. *Rhode Island Hospital* (13 R. I. 411), 34 Am. Rep. 675.

tution, and sustained serious injury in consequence of such treatment.

The Circuit Court rejected the prayers offered by the plaintiff, and in conformity with the tenor of a prayer presented by the defendant, instructed the jury that the evidence in the cause was not legally sufficient to support the action. An instruction, thus eradicating the right of action, when brought under review, invokes the determination of questions relative to the responsibility of such corporations in actions of this nature.

With much earnestness of argumentation it has been contended that there can be no proper foundation for this action, because the house of refuge is like the penitentiary of Maryland, an institution constituting a part of the government of the State, and therefore is not civilly liable in its corporate capacity for the tortious acts of its agents employed with a view to the efficient discharge of its public functions. There is however a widely perceptible dissimilarity between this corporation and the penitentiary. The latter is under the exclusive control of the government of the State. Its directors are appointed by the executive; its other officers receive their appointments from the directors; are required to give bond, and the remuneration for their services is designated and established by statutory provisions by which the entire government of the institution is regulated and controlled. On the other hand the subscribers to the house of refuge are declared, by the act of incorporation, to be a body politic and corporate, and each subscriber who pays the required sum is constituted a member for life. The conduct of its affairs is intrusted to a board of twenty-four managers; and of this number ten are elected by the members of the association, ten chosen by the mayor and city council of Baltimore, and four appointed by the governor of the State. Seven of these managers constitute a quorum for the transaction of business. They are authorized to make by-laws, ordinances and regulations, and to appoint officers, agents and servants, and to designate their duties. The mayor and city council are authorized to appropriate any sum of money, not exceeding $25,000, toward defraying the current expenses of the house of refuge and St. Mary's Industrial School, and pecuniary aid is also received from the treasury of the State.

It does not follow however that because a number of the board of managers are appointed by the State, and others by the mayor and city council of Baltimore, the corporation is thereby converted

into a public institution. In this court and in those of other States, the exposition of principles, determining the *status* of such institutions in this respect, has been in an opposite direction. It has been distinctly declared that the appointment of trustees and directors by State or municipal authority, to participate in the management, does not divest these associations of the attributes of private corporations, and clothe them with the immunities and privileges appertaining to public institutions. *St. Mary's Industrial School for Boys* v. *Brown*, 45 Md. 330; *Nelson* v. *Cushing*, 2 Cush. 521.

It has been contended that a corporation cannot be made a defendant in an action of this nature; the remedy being solely against the individual who committed the wrong. Not until a comparatively recent period has the law in this respect undergone important mutations. It was for a long time maintained as an undoubted principle that a corporation could neither sue nor be sued in an action of battery, the reason assigned being that a corporation could "neither beat nor be beaten in its body politic." The enlightened jurisprudence of the present age has ignored such metaphysical subtilties, and recognized a rule more in conformity with the modern tendency to respond to the demand for substantial justice in every exigency. It is now a principle, established by numerous adjudications, that if the servant of a corporation aggregate commit an assault by the authority of the corporation, an action of trespass for assault and battery may be maintained against such corporation. And if the assault is committed on behalf of and for the supposed benefit of a corporation, the body politic, by ratifying the act, incurs the responsibility. *Moore* v. *Fitchburg Railroad Corporation*, 4 Gray, 465; *Hewett* v. *Swift*, 3 Allen, 422.

In the consideration of questions of this nature it must not be forgotten, that in legal contemplation a corporation is an artificial entity, and can only act through the intervention of its officers or agents. When the agent of an individual, acting within the scope of his designated duties, commits a trespass, the principal is constructively present and by implication authorizes and sanctions the act and thus incurs the legal responsibility. It is obvious that this principle is necessarily applicable in all suits against bodies politic and corporate. And it is important to advert to another fundamental rule. A corporate body is the mere creature of law; deriving all its powers from the act of incorporation, and existing solely by legal sanction within the limits prescribed by legislative authority.

Within its sphere of action it is liable for torts as well as for infractions of contract; but beyond that point the individuals who participated in the pretended corporate acts are personally responsible. *Head* v. *Providence Ins. Co.*, 2 Cranch, 127; *Rogers* v. *Burlington*, 3 Wall. 669.

But while an artificial being of statutory creation can only act within its assigned limits, it has all the powers either expressly given, or which are incidental to its existence and essential to its successful operation, and therefore necessarily created by implication. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 636; *Thomas* v. *West Jersey R. Co.*, 101 U. S. 71.

The appellee being a body corporate, its authority to order or sanction the infliction of punishment by castigation, is a question which is presented for consideration. If this authority exists at all, it exists by implication. It must be remembered that this is an institution of a peculiar character. It was founded as a place for the custody, care and reformation of unfortunate youths, either vagrants, convicts or such as are incorrigible by the ordinary discipline applied by parents and guardians.

It would seem to be an idle, nugatory and futile undertaking to create an institution for the purpose of reforming vicious youths, incorrigible by the exercise of parental authority, unless such institution is authorized to exert the same coercive powers of correction which are given by legal sanction to the natural guardian. A parent can inflict punishment so that it be not excessive, and it is supposed to be his duty so to do when milder means of control are found to be ineffectual. By the creation of this corporation, the State has placed it in *loco parentis* as respects a vicious or incorrigible minor under its control. Its power to inflict punishment is derived by implication from the act of incorporation. Authorized by the act to adopt by-laws for its government, it has prescribed the mode in which corporal punishment is to be inflicted. None of the minors can be so punished except by an order of the visiting committee; and such punishment must be inflicted either by the superintendent or by some one in his presence, acting under such order. Another by-law has for its special object, the protection of the inmates from acts of violence on the part of the officers and agents of the institution. It expressly prescribes as a rule, to be strictly observed, that "no officer shall be allowed to strike, cuff, kick, or inflict any bodily punishment on any inmate."

Assuming the entire verity of the evidence adduced by the plaintiff, there is nothing in that evidence tending to show that the appellant was punished under an order of the visiting committee, by or in the presence of the superintendent. And if he was assaulted by any of the officers or agents of the institution, it is not revealed by the record that such assault was authorized by the defendant, nor is its subsequent approval and sanction of such acts of aggression made apparent. And notwithstanding the exigency of the rule that the *allegata* must be supported by the *probata*, the averment in the declaration of culpable negligence on the part of the defendant is not established by any proof adduced by the plaintiff.

This record does not therefore present a case rendering the appellee obnoxious to the imputation of having either authorized or sanctioned the tortious acts of its agents, even if the applicability of the principle enunciated by the Supreme Court of the United States in *Phila. & Reading R. Co.* v. *Derby*, 14 How. 484, should be recognized. Whether there is any perceptible analogy between that case and the one disclosed by this record need not now be made a matter of inquiry, for on another and distinct ground obviously rests the final determination of this controversy. It has been urged, with much cogency in argument, that the organic principles on which this institution is founded constitute it an eleemosynary corporation holding its estates and funds in trust for charitable purposes, and that it is not therefore responsible as a defendant in an action for damages. This question seems never to have been settled by adjudication in this State, and in an examination of authorities introduced from exterior sources, we are confronted by some diversity of opinion. When in the absence of light to be derived from domestic adjudication, this court is embarrassed by an antagonism in the rulings emanating from other jurisdictions, it must necessarily, by an eclectic method of appropriation, select, adopt, and be governed by such decisions as are in consonance with that sound reason which is said to be the life of the law, and which therefore affords the safest and most solid basis for a judicial determination.

It cannot be denied that the House of Refuge is an institution holding property contributed solely for benevolent purposes. If under the impulse of that humanity, which is the distinctive characteristic of the present age, associations are formed for the erection of hospitals, with a view to afford relief to indigent sufferers

from physical afflictions, it might with obvious propriety be suggested that an institution, originating in the co-operative action of benevolent individuals, and having for its object the amelioration of the condition of unfortunate minors who have become the victims of vicious habits and propensities, should be designated as a hospital for the cure of moral diseases. Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from the municipal and State treasuries. These are the funds of the institution, controlled by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. This then is an institution resting on an eleemosynary foundation. In *McDonald* v. *Mass. General Hospital*, 120 Mass. 432; s. c., 21 Am. Rep. 529, it is held that a corporation, deriving its funds mainly from public and private charity, and holding them in trust for the object sustaining the hospital, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution; and where it has exercised due care in the selection of its agents, it is not liable in an action for injury caused by their negligence.

In the case of *Feoffees of Heriot's Hospital* v. *Ross*, 12 Clark & Fin. 507, in the House of Lords, it was decided that "if charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund."

Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents.

Lord COTTENHAM said: "There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."

Lord BROUGHAM concurred, and added: "The charge is, that the governors of the hospital have illegally and improperly done the act in question; and therefore because the trustees have violated the statute, therefore—what? not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answer-

able for their misconduct. The finding on this point is wrong, and the decree of the court below as to the damages must be reversed."

The language of Lord CAMPBELL is even stronger and more emphatic. He said: "It seems to have been thought, that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason and justice and common sense. Such a perversion of the intention of the donor would lead to the most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. * * * * Damages are to be paid from the pocket of the wrong-doer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it."

In the absence of any decisions in Maryland, we are constrained to adopt the exposition of principles by these eminent English judges, and are thus led to the determination, that damages cannot be recovered from a fund held in trust for charitable purposes. In the language of Lord CAMPBELL, "the wrong-doer must pay from his own pocket."

The appellee was not therefore liable in this action, and there having been no error in the ruling of the Circuit Court, its judgment must be affirmed.

Judgment affirmed.

SHARTZER v. STATE.

(63 Md. 149.)

Criminal law — rape — evidence of specific unchaste acts.

On a trial for rape, evidence of specific unchaste conduct of the prosecutrix is inadmissible,* whether sought to be proved by herself or others.

CONVICTION of rape. The opinion states the case.

* *Commonwealth* v. *Harris*, 131 Mass. 336; *Contra: Binstine* v. *State* (2 Lea, 169), 31 Am. Rep. 598.

William Walsh, for appellant.

Charles B. Roberts, attorney-general, *Benjamin A. Richmond*, State's attorney for Allegany county, and *John W. Veitch*, State's attorney for Garrett county, for appellee.

ROBINSON, J. The appellant was tried for committing a rape, and the main question on this appeal is whether the prosecutrix could be asked whether she had previously had connection with another person, other than the prisoner?

The decisions on this question, it must be admitted, have not been uniform either in England or in this country. Plausible reasons have been assigned, and adjudged cases are to be found, both for and against the admissibility of such evidence, and some courts have gone so far as to allow the prisoner to prove specific acts on the part of the prosecutrix. At the argument I had, I must confess, some difficulty in regard to the matter, but upon further consideration we are all of opinon that the objection to the question was properly sustained by the court.

The accusation, it is true, necessarily involves the question of consent or no consent on the part of the prosecutrix, but the mere fact that she may have had connection with another person does not tend to prove that she gave consent to the prisoner. And this is the real question at issue before the jury. Besides if the question can be asked as to one person, it may be asked as to another, and thus the whole history of the prosecutrix's life might be gone into, and this too without notice to her. Instead of the one issue, we should have a number of collateral issues, involving an inquiry into matters as to which the prosecutrix might be wholly unprepared.

In *Rex* v. *Hodgson*, 1 Russ. & Ry. 211, the prisoner was tried for committing a rape, and his counsel proposed to ask the prosecutrix, "whether she had not before had connection with other persons, and whether she had not before had connection with a particular person named." The objection to the question was sustained by Mr. Baron WOOD, before whom the case was tried, and the prisoner having been found guilty, the question was reserved for the consideration of the judges. It was first heard before eight judges, but MANSFIELD, C. J., MACDONALD, C. B., GROSE, J., and LAWRENCE, J., being then absent, it was postponed for further consideration to the Hilary Term, when all the judges being present, it was again

heard, and they were all of opinion that the question was inadmissible. Here then is a deliberate decision of the twelve judges England.

In the subsequent case however of *Regina* v. *Robins*, 2 Moody & Rob. 512, the prosecutrix having on cross-examination denied that she had had connection with others than the prisoner, COLERIDGE, J., after consulting ERSKINE, J., decided that it was competent for the prisoner to prove the prosecutrix had had connection with the persons named, for the purpose of contradicting her.

In the still later case of *Queen* v. *Holmes*, L. R., 1 C. C. Res. 304; S. C., 12 Cox C. C. 137; 1 Moak's Eng. R. 226, the prosecutrix having on cross-examination denied that she had had connection with one Robert Sharp, the counsel for the prisoner offered to prove by Sharp, that he had had connection with her, but the prosecution objected to the question and the court refused to admit the evidence. The prisoners were found guilty, and the question was reserved for the decision of the Court for Crown Cases Reserved consisting of KELLY, C. B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J. The prosecutrix had denied having intercourse or connection with Sharp, and the precise question before the court was whether the defense had the right to prove by Sharp that he had had connection with her? But the judges in delivering their opinions review all the decisions in regard to the admissibility of evidence on a trial for rape, and expressly affirm the ruling of the twelve judges in *Rex* v. *Hodgson*, and overrule the decision of COLERIDGE, J., in *Reg.* v. *Robins*.

In referring to *Rex* v. *Hodgson*, KELLY, C. B., says: "That case was heard first before eight of the judges, and afterward before the whole number. It was an actual decision that the prosecutrix on a charge of rape was not bound to answer such a question as that here put."

This decision was made in 1871, and the law in regard to the question ought to be considered as settled in England.

In this country the decisions are somewhat conflicting. In some States the courts have held that not only may the prosecutrix be asked in regard to having had previous connection with other persons, but that evidence is admissible for the purpose of proving such intercourse, as bearing on the question of consent. *Titus* v. *State*, 7 Baxt. 132; *People* v. *Benson*, 6 Cal. 221; *State* v. *Reed*, 39 Vt. 417; *State* v. *Johnson*, 28 Vt. 512.

The weight of authorities is however, we think, against this view. *State* v. *Knapp*, 45 N. H. 148; *Com.* v. *Regan*, 105 Mass. 593; *State* v. *Turner*, 1 Houst. C. C. (Del.) 76; *Richie* v. *State*, 58 Ind. 355; *State* v. *Vadnais*, 21 Minn. 382; *McCombs* v. *State*, 8 Ohio St. 642; *Pleasant* v. *State*, 15 Ark. 624.

After a full examination of all the cases, and the principles on which they are based, we are of opinion that the prosecutrix could not be asked the question whether she had previously had connection with another person.

The objection to the evidence offered in the second bill of exception was also properly sustained. The State proved by Doctor Keller that on the day after the alleged offense he examined the prosecutrix, a girl not quite thirteen years of age, and found the hymen ruptured and her private parts slightly swollen and inflamed and sensitive to the touch, and further said, that in his opinion, the hymen might have been destroyed by natural causes, and the inflammation might have been produced by causes other than coition.

The prisoner then offered to prove by one Lipscomb, that his brother, more than a year prior to the date of the alleged offense, had connection with the prosecutrix in his, witness', presence. This evidence if offered to prove a specific act was clearly inadmissible, and if offered to contradict or rebut the evidence of Doctor Keller, it was equally inadmissible. Doctor Keller testified he found the hymen ruptured, but expressed no opinion as to the time when it was ruptured. Besides, the prisoner in his own testimony admitted he had connection with the prosecutrix on the day charged in the indictment, but said it was with her consent. With this admission the evidence of Doctor Keller was wholly immaterial.

The evidence offered in the third and fourth bills of exception was irrelevant and in no manner pertinent to the issue. Evidence in regard to the general character of the prosecutrix for truth and veracity, or for chastity, was admissible, but not proof of specific acts which tended to show that she was an immoral person.

Rulings affirmed, and cause remanded.

COLLINS v. FOLEY.

(63 Md. 158.)

Will — power to lease — perpetuity — restraint of alienation.

A will devised property to a certain trustee and his personal representatives, to hold for the use of the testator's son during his life, and for the use of his children after his death, with power to the trustee, but not to his representatives, to lease. *Held*, that a lease for ninety-nine years, renewable forever, was not void.

THE opinion states the case.

Francis P. Stevens, Richard Bernard, and *Arthur W. Machen*, for appellants.

S. Teackle Wallis, Jr., and *S. Teackle Wallis*, for appellee.

MILLER, J. The question whether the lessees will take a good title under the lease, which the decree appealed from in this case requires them to accept, depends upon certain clauses in the will, and codicil thereto, of Mrs. Emily MacTavish, which was admitted to probate in February, 1867.

By this will the testatrix devised all the rest and residue of her estate to her friend, "Daniel J. Foley, his heirs, executors and administrators in trust," in the first place to pay an annuity and a certain sum of money to her grandson, Francis Osborn MacTavish, and then "all the remainder of my estate of all sorts it is my will, and I hereby direct that my said trustee, Daniel J. Foley and his representatives as aforesaid, shall take and hold to and for the use and benefit of my son, Charles Carroll MacTavish, for and during his life only, so that he shall have and enjoy the same, and the rents, issues and profits thereof without impeachment of waste, and from and immediately after his decease then to and for the use and benefit of all and every the children and child of my said son, Charles Carroll MacTavish, and their descendants (to take *per stirpes*) who shall be living at his death, their heirs, executors, administrators and assigns forever, the shares of such children and descendants who shall be females, to be, and they are hereby devised to, their sole and separate use respectively, to the same effect and with the same

powers of disposition by deed or will in regard thereto as if they were *femes sole*, free from all control of any husband they may respectively marry, and from all responsibility whatsoever, for such husbands, their debts or engagements." And then immediately following is this clause: "I hereby authorize and empower the said trustee, with the consent of my son, Charles Carroll MacTavish, during the life of the latter, and subject to the approbation of the Orphans' Court of Baltimore city after the death of my said son, to make such changes of investments of the rest and residue of my said property, and such re-investments and changes from time to time as may in the judgment of said trustee be proper and advantageous, for the which end I hereby authorize and empower my said trustee to do all lawful acts, and execute and deliver all needful deeds and instruments of writing in the premises, with the consent and authority aforesaid, full power to lease being included herein." By a codicil to this will she makes provision that in case all the children of her said son should die before reaching the age of twenty-one, and without lawful issue of any of them living at the death of the survivor of them, then at the death of such survivor, and of her said son, all the property devised to Daniel J. Foley in trust as aforesaid shall pass to her friend, the Reverend Thomas Foley, in fee, and to this provision she adds the following clause: "Lest there be any misunderstanding as to the powers of my said trustee, Daniel J. Foley, as to the leasing of the property by my said last will, and this codicil devised to him in trust, I hereby declare it to be my intention, that with the consent and approbation in my said will prescribed and provided, he shall have full power and authority to make and execute any and all leases whatsoever, of any and all portions of the rest and residue of my estate which he may deem advantageous and proper."

Powers of leasing are very common in English settlements and wills. In that country every well-prepared settlement and will of real estate, unless its value be inconsiderable, or the circumstances of the case do not require it, contains a power of leasing, and as was said by Lord MANSFIELD in *Taylor* v. *Horde*, 1 Burr. 120, "of all kinds of powers, this is the most frequent." The general rule of interpretation which prevails here, as in all similar cases, is that such powers must be construed according to the intention of the parties, and as Lord KENYON said in *Pomery* v. *Partington*, 3 T.

R. 674, if judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them. 1 Platt on Leases, 394, 398.

Applying this rule to the will before us, there seems to be no room for error or doubt. The testatrix was possessed of farming lands in the country, and of vacant, unimproved lots in the city of Baltimore. The only mode by which the trustee, under the powers given him, could make the latter (without selling them) productive of income was to lease them, according to the prevailing system of tenure in that city, under leases for ninety-nine years, renewable forever; and when she gave him the power to make "all leases whatsoever of any and all portions" of the residue of her estate which he might deem advantageous and proper, it is perfectly clear she intended he should have the power to make such leases of her unimproved city lots, and that too whether they were made for the purpose of changing investments or not.

But the validity of the power has been assailed, and it is said, in the first place, that it infringes the rule against perpetuities. Without doubt, a leasing power may be so framed as to transgress this rule. Such was the character of the power in *Barnum's* case, 26 Md. 119, where the power given by the will to the trustees and their heirs and successors to make leases was by express terms extended beyond the limits prescribed by the rule. But Mr. Lewis, in his admirable treatise on the Law of Perpetuity, in considering the rule as it affects the limitation and exercise of powers of sale, exchange, partition, leasing, and the like, makes, among others, this deduction from the authorities, viz., that there can be no objection on the ground of remoteness to such unconfined powers, when limited to a person *in esse*, or several of such persons, and the survivors and survivor of them, and not extended to their representatives. In such case they resemble a springing use or executory devise, to arise within the compass of a life in being, and like these executory limitations, they in no degree trespass the perpetuity boundary. Lewis on Law of Perpetuity, 554. And such, according to our interpretation of it, is the limitation of the power in this case. If there is any provision in the will indicating that it was the intention of the testatrix that this particular power should devolve on any successor of Mr. Foley in the trust, that provision is

superseded by the codicil in which the leasing power is given to him *nominatim*, "my said trustee, Daniel J. Foley," and is not extended to his heirs, representatives or successors; so that the power continues during his life and no longer. But if we are in error in extending it is thus far, the least limit of continuance that can reasonably be assigned to it is during the life of the son, and after his death during the minority of all his children, in case he should die before they all attained the age of twenty-one years. The will and codicil both require the leases to be made with the "consent" of the son during his life, and "subject to the approbation of the Orphans' Court," after his death; and by requiring the approval of this court it may perhaps be reasonably inferrred that it was her intention that the power should continue so long only as any of these children should be subject in any wise to the control of that tribunal. But whether we take the one limitation or the other makes no difference in this case, because either will cover the time at which the contract for the lease in controversy was executed.

But it is also argued that this leasing power is repugnant to the estates created by the will, and therefore void. It is admitted that Charles Carroll MacTavish, the son of the testatrix, died in March, 1868, leaving four children, all of whom are now living. The eldest of these children (a daughter) attained the age of twenty-one in June, 1875, and this event put an end to the executory limitation in favor of the Rev. Thomas Foley. Counsel for the appellants argue that these children took under the will a remainder in fee freed from the trust, and that any limitation or restriction upon their absolute power over it, such as a power of leasing in another, is repugnant to the nature of such an estate and void. If they are right in this, then it is clear that the leasing power is stricken down altogether, for there is no more reason for construing the will as creating a trust over the life estate than there is over the estate in remainder. In order to sustain their position, the will must be read as making a direct devise to the son for life, with remainder in fee to his children, and attaching to the estates so created this leasing power in another. If instead of this leasing power there were annexed to such estates a condition against alienation, even for a limited time, the authorities cited by counsel would be applicable. In the case of *Mandlebaum* v. *McDonell*, 29 Mich. 76; S. C., 18 Am. Rep. 61, where the question is elaborately discussed by Judge CHRISTIANCY, the will created a life estate, with remainder in fee to cer-

tain named devisees, and imposed the condition that the property should not be sold until the youngest of the devisees attained the age of twenty-five years, and the court held the restriction void, and that a restriction which would suspend all power of alienation of such an estate, even for a single day, is inconsistent with the estate granted, unreasonable and void. This was followed by the recent English case of *Rosher* v. *Rosher*, 26 Ch. Div. 801. where a testator devised an estate in fee to his son, provided that if he wished to sell it during the life of the testator's wife, she should have the option to purchase it at a sum which was about one-third of its market value, and it was held that this proviso amounted to an absolute restraint on alienation during the life of the testator's widow, and was void in law.

But neither of these cases is the one before us. Judge CHRISTIANCY, in discussing the question in his case, is careful to point out in the first place what it does not involve, and says: "It does not involve the question whether a restraint upon the sale of this property for an equal length of time might not have been rendered legally effective by the conveyance of the legal title to trustees in trust for the benefit to these devisees, according to instructions as to the time of sale which might have been inserted in the will, in which case the validity of the restriction as to time would depend mainly upon the question whether the period exceeded that allowed by the rule against perpetuities." In the case before us there is just such a devise in trust. The testatrix devises the residue of her property to a trustee and his heirs, executors and administrators in trust to accomplish, in the first place, a specified purpose, and then directs that the trustees "and his representatives" shall hold the remainder of it for the use and benefit of her son during his life, and after his death for the use and benefit of his children; and she then gives to this trustee a leasing power which as we have shown does not offend the rule against perpetuities. This is quite different from clogging a direct devise in fee, with a restriction upon alienation. In fact, one of the principal purposes of interposing the trust seems to have been to enable the testatrix to confer upon the trustee this leasing power, and we think it may be safely affirmed that in all the range of authorities no case can be found in which the validity of such a power, thus conferred and thus limited, has been questioned. Such powers are not only reasonable, but are sometimes necessary, especially in a case like this, where the es-

tate disposed of consists largely of property, the income from which must consist of rent reserved under leases, and where infants are the beneficiaries. At all events the testatrix had the right to dispose of her property as she pleased, and this disposition of it does not, in our opinion, violate any established rule of real estate law.

[Minor points omitted.]

Decree affirmed, and cause remanded.

Heighe v. Littig.

(63 Md. 301.)

Will — trust — life estate — partnership profits.

A will created an estate for life in the residue with remainder over. Shortly before death the testator formed a partnership, to be carried on for three years, even if he should die sooner. *Held*, that the profits went to the life-tenant as income.*

BILL for accounting. The opinion states the case.

W. C. Schley and *Bernard Carter*, for appellants.

I. Nevett Steele and *S. Teackle Wallis*, for appellee.

Yellott, J. From the bill of complaint and the proof embodied in the record it appears that Charles H. Ross departed this life on the 20th day of January, 1861. Prior to his decease, and on the 21st day of November, 1860, his last will and testament was executed, to which was subsequently added a codicil on the 29th day of December, in the same year. By the terms of these testamentary dispositions of his property, after making provision for the payment of debts and some small legacies, he gave all the rest and residue of his estate to his wife and her successors, in trust for her sole and separate use and benefit during her natural life, with a proviso that if any one of his sons should attain the age of twenty-one years, during the life of his mother, he should be paid the sum of $5,000 out of the estate; this proviso being applicable to each son who should reach that age while his mother was living. And an annual

* See *Brinley* v. *Grou* (50 Conn. 66), 47 Am. Rep. 618.

payment of $300 was directed to be made to each daughter who should marry during the life of her mother.

After the death of his wife the testator gave one-sixth of the trust estate thus created to each one of his six children, the sons each to have $5,000 at the age of twenty-one years, and the remainder of the sixth at the age of thirty years. It was provided that the daughters should receive the income from their respective portions of the estate thus divided during their lives, after which the principal was to go to their children; and in the event of there being no children then to their surviving brothers and sisters. If any of the sons died before receiving the whole of the share or shares thus assigned the remainder was to go to the surviving brothers and sisters.

The eldest son of the testator died intestate, unmarried and without issue, in the year 1880. He had not at the time of his death attained the age of thirty years. The third son died soon after the testator, being then an infant, unmarried, without issue and intestate. The four children of the testator now living are Mrs. Heighe, Mrs. Littig, a daughter Fannie, at this time an inmate of an insane asylum, and John R. Ross, a resident of Baltimore county.

Clara A. Ross, the widow and executrix of said testator, died in May, 1881. She left a will by which she bequeathed all she possessed, with the exception of some small legacies, to her son John and her two married daughters; and by the terms of said will constituted her said son John her executor.

The complainants are manifestly entitled to the relief asked for in their bill of complaint. It is necessary that a trustee should be appointed to take charge of the estate and to completely execute the trust created by the will of said Charles R. Ross. They have also a right to ask that the defendants account with them; that the inventory be corrected; and that the exact amount of the *corpus* of the estate be, as far as possible, ascertained and established.

The only remaining question, to be determined by this court, is in relation to what should constitute the *corpus* of the estate. This question was ably argued by learned counsel on both sides, but does not seem to present any very great difficulty.

Mr. Ross, the testator, bequeathed his property to be held by his wife in trust for her own use and benefit, during the term of her natural life. She was therefore entitled to the income of the estate; for if it were otherwise, the bequest would have been nugatory and unproductive of benefits. As she had a life estate, she was en-

titled to the whole income in the absence of any restrictions in the will. She could not however appropriate any portion of the capital to her own use. Just before his death, Ross had entered into a copartnership which was to continue for three years, and even in the event of his death, to be carried on until the end of that period. It is conceded that he had invested about $41,000 in this enterprise. This capital was the only portion of his property which was productive, and very large profits seem to have been derived from the transactions of this partnership. It is contended by the appellees that these profits should be merged in the *corpus* of the estate, while the opposite party hold that they belonged to the life tenant. There would have been but little difficulty in coming to a satisfactory conclusion in relation to the question thus involved in controversy, if Ross, instead of investing his capital of $41,000 in a profitable mercantile enterprise, had purchased a productive farm in the county of his residence, and by his will, left it to his wife for life, and then in equal parts to his children. In that case, no one would undertake to dispute that the life tenant was entitled to all the income derivable from this investment. She could not diminish the value of the investment by committing waste, neither could she be required to increase the value by taking a portion of the income and investing it for the benefit of her successors. In determining the respective rights of parties it is difficult to perceive a substantial distinction between this supposed investment in land, and that in a commercial copartnership. The profits of capital constitute income which inures to the life tenant. Sound reason leads to this conclusion, and in support of so plain a proposition, the citation of numerous adjudicated cases would seem to be unnecessary.

The dividends of the copartnership were distributed among the members of the firm in conformity with the terms agreed upon at the time of its formation. The larger portion of these dividends inured to the representative of Charles R. Ross. But dividends do not constitute a part of the *corpus* of an estate any more than interest on money constitutes a portion of the principal invested. It has been held that the words "dividend" and "income" used in a will bequeathing stock mean the same thing. *Reed* v. *Head*, 88 Mass. 177.

Where a trust has been thus created for the benefit of some one for life the principle seems to be established beyond controversy

that the ordinary profits and natural increase go to the life tenant. *Sutton* v. *Crain*, 10 Gill & J. 458; *Harvard College* v. *Amory*, 26 Mass. 446; 2 Perry Trusts, § 544, 545.

The rule, so strenuously contended for on the part of the appellees, is only applicable in case of an extraordinary bonus or addition to the usual income of stock or other property settled in trust for the benefit of one for life. It has no application to the ordinary revenue or income derived from any investment, no matter how large such revenue or income may have become by successful management. *Reed* v. *Head*, 88 Mass. 176; *Clayton* v. *Gresham*, 10 Ves. 288; *Paris* v. *Paris*, 10 Ves. 185; *Brander* v. *Brander*, 4 Ves. 800.

There is therefore apparent error in that portion of the decree of the court below, which determines that any part of the dividends or income derived from the partnership, or any other investment of capital, should be added to the *corpus* of the estate.

While the widow was entitled to no portion of the capital sum invested, she was entitled to the income as already defined and designated. In all other respects the said decree of the Circuit Court seems to be correct and proper.

It must therefore be affirmed in part and reversed in part, and cause remanded, so that proceedings may be had in conformity with the principles enunciated in this opinion; the costs to be paid out of the trust fund.

Decree affirmed in part, and reversed in part, and cause remanded.

Cause remanded.

THOMAS v. FORD.

(63 Md. 346.)

Way — prescription to public.

The public may not gain by prescription the right to use the land of an individual, on a navigable river, as a place of landing and of deposit of chattels for an indefinite time.

TRESPASS *quare clausum fregit.* The opinion states the case. The plaintiff had judgment below.

B. Harris Camalier and *Daniel R. Magruder*, for appellant.

Daniel C. Hammet and *Frank H. Stockett*, for appellee.

ALVEY, C. J. [Omitting minor points.] The action is for an alleged trespass *quare clausum fregit*. And the grievance alleged, in addition to the breaking and entering the close, is, that the defendant incumbered the land of the plaintiff, along the shore of the river Patuxent, by piling a large quantity of cord wood thereon, whereby the plaintiff was deprived of the use and enjoyment of the land thus incumbered by the wood.

At the trial the plaintiff asked three instructions from the court to the jury, and the defendant asked none. The first and second prayers were granted as modified by the court, and the third was refused, without any substituted instruction therefor. The first prayer, as offered, asked the court to instruct the jury, that if they found the defendant to be guilty of the acts of trespass complained of, then the plaintiff was entitled to recover, as the measure of damages, such a sum per cord as the jury might find such use and occupation of the land was worth, "and such further damages as they might find the plaintiff had suffered by such use and occupation of the said shore." This prayer was granted, with the omission of the last clause, in respect to further damages.

The second prayer, as offered, was, that though it might be found as a fact that other persons besides the defendant deposited wood and other things upon the river shore on the land of the plaintiff, the *locus in quo*, such acts of other persons afforded no justification to the defendant, such acts of user not being sufficient to constitute the said shore a public landing; and that there was no sufficient evidence to establish the existence of a public landing, with definite limits. This prayer, as offered, was rejected; but in lieu thereof the court instructed the jury that such acts or user of third persons would afford no justification to the defendant, "unless the jury should further find that such user of said land was adverse to the claim of the plaintiff, and those under whom he claimed, exclusive and uninterrupted, for at least twenty years, and that such user was within reasonably defined limits."

The third prayer asked that the jury be instructed, that in estimating the damages no deduction should be made by reason of the fact that some portion of the wood deposited was piled or corded "upon the bed of the public road running through the land of the plaintiff along the said river shore." This prayer was rejected by the court, and no instruction was given in lieu thereof.

It is upon these prayers, as offered, and the instructions actually given, that the questions arise on this appeal.

The plaintiff's land, known as "Mattaponi," bounds on the Patuxent river for a considerable distance; and through this land there runs a public county road to a wharf owned by the plaintiff on the river, and from the wharf the road runs up and along the shore of the river for some distance before leaving the land of the plaintiff. Just immediately below the wharf, and on the right of the road approaching the same, there is a public landing regularly laid out by public authority, within fixed and definite bounds, but which space does not include any part of the *locus in quo*. Between the road running up the shore from the wharf, and high-water mark on the beach of the river, there is a slip or narrow space of ground belonging to the plaintiff, and it was upon this slip or space, and upon a part of the ground embraced within the limits of the public road, that the alleged acts of trespass were committed. The defendant offered evidence tending to prove that the shore above the wharf, for the distance of eighty to a hundred yards, had been used for many years, by many persons, for purposes of shipping cord wood and other freight, and that such user was without objection on the part of the plaintiff, though known to him, and further, that there were no marks or bounds to separate or define the portion of the shore that had been so used by shippers, from the other parts of the shore on the plaintiff's land — the space occupied by the cord wood of the defendant being the space between the river shore and the public road, including a part of the public road, and extending from the wharf up the shore for a distance of from eighty to one hundred yards. The defendant also offered evidence to prove that part of the wood so corded by him was upon the bed of the public road that runs through the plaintiff's land down to the wharf and along the river shore.

The defense in the case is founded upon the theory that in addition to the public landing, regularly laid out and defined below the wharf, by statutory authority, the space intervening between the margin of the river, and the public road above the wharf, has become a part of the public landing, with the right in the public to make deposits of articles of freight thereon, and that such right has been acquired either by prescription, or by dedication to public use If the right has not been acquired in one or the other of these modes,

the defendant has no justification for the alleged trespass committed by him.

It is certainly a settled doctrine in this State that public roads, or ways of any kind, can only be established by public authority, or by dedication, or by long user by the public, which though not strictly prescription, yet bears so close an analogy to it, that it is not inappropriate to apply to the right thus acquired the term prescriptive. Hence the existence of a public way may be established by evidence of an uninterrupted user by the public for twenty years, the presumption being that such long continued use and enjoyment by the public of such way had a legal, rather than an illegal origin. *Day* v. *Allender*, 22 Md. 511. But the question here is, whether at the common law, this principle of presumptive dedication, or *quasi* prescription, does or can properly apply to give rise to a right in the general public to use the land of another on a navigable river as a landing-place and place of deposit of wood and other articles of property for an indefinite time. That question has never been decided by this court; though it has been the subject of a most thorough and exhaustive discussion in the Supreme Court, and in the Court of Errors, of the State of New York, and has been decided by other State courts.

In the case of *Cortelyou* v. *Van Brunt*, 2 Johns. 357, the action was for trespass *quare clausum fregit*, and the defendant pleaded the general issue, and gave notice that he would offer in evidence a prescriptive right of fishing in the sea adjoining the *locus in quo*, and of using and occupying the shore for that purpose, the use of the shore being to erect huts thereon for the use and accommodation of the fishermen during the fishing season. But the court held that no such right could be acquired by prescription. And in the subsequent case of *Pearsall* v. *Post*, 20 Wend. 111, which is the leading case upon the subject, and in which will be found reviewed all the authorities up to that date bearing upon the question, the Supreme Court of New York held, that the public had no right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such user had been continued for more than twenty years, with the knowledge of the owner. That such user could not be urged by the public, either as the foundation of a legal presumption of a grant, and thus justify a claim by prescription, or as evidence of dedication of

the premises to public use. This case was taken to the Court of Errors, where after the most thorough discussion it was affirmed (22 Wend. 425); and we are not aware that the decision has ever been questioned. Decisions of similar import have been made in other States, as in the case of *Bethum* v. *Turner*, 1 Greenl. (Me.) 111; *Chambers* v. *Furray*, 1 Yeates, 167, and *Cooper* v. *Smith*, 9 Serg. & R. 26.

Indeed the very nature of the user set up in this case as evidence of the prescriptive right in, or dedication to the public, renders it quite out of the question that such right could, upon principle, exist in the public generally. From the very nature of the user relied on it must be confined to but few individuals, and this negatives the idea of the existence of the right in the general public. Instead of the right being a mere easement or servitude, without profit in the soil, and open to the enjoyment of all alike, it would be an exclusive appropriation of the actual use of the soil to the first occupier or depositor of wood or other articles, without limit as to extent or duration of time. The claim here set up is the right in the general public to deposit and cord wood upon the plaintiff's land acquired by user merely. This of course must be confined to a defined or limited space. If the right were established, each individual member of the public could not enjoy it, for the first occupier would have the right to appropriate the entire space to himself and no one could question his right in so doing. While he remained in possession all the rest of the public would be excluded; and there would be no mode of determining the question as to the extent of the ground that might be appropriated, or the duration of time that it could be occupied; it might indeed be so occupied for an indefinite duration of time. And as was said by the court in the case of *Cortelyou* v. *Van Brunt*, *supra*, such user rather denotes title, and the right of exclusive enjoyment, than the enjoyment of a mere public easement; and the right to such user by the public cannot be acquired by prescription.

Professor Washburn, in his work on Easements (3d ed.), top page 122, lays it down as settled law, that "a right like that to use a landing place upon the shore of navigable waters for depositing articles, such as wood and the like, cannot be claimed for the public, nor for all the inhabitants of a State, by prescription or custom." And so in Bennett's edition of Goddard on Easements, page 186, it is laid down that a custom for the public, to use the

land of another on a navigable river as a landing place, and a place for deposit of goods, cannot be supported. And this would seem to be founded in reason and sound public policy.

As appropriate to this case, we may repeat here what was said, with great force of reason, by COWEN, J., in *Pearsall* v. *Post*, that considering the great extent of shore lines within our State, and the long and uniform indulgence extended by the proprietors of those shores to those who have had occasion to use them for purposes connected with water transportation or fishing, a decision which should admit the possibility of turning such permissive enjoyment into prescriptive and absolute right on the part of the public, would open a field of litigation which no community could endure. And what is still worse in a moral point of view, it would be perverting neighborhood forbearance and kind indulgence to the destruction of important rights. Consequently if it be once understood that this permissive indulgence of the proprietors of the shores may be construed into irrevocable privileges, restrictions and hindrances will inevitably follow, to avoid the possibility of such permissive use maturing into public adverse rights. The production of any such consequence surely ought not to be desired by any one.

With these views, this court is of opinion that there was error committed by the court below in refusing to grant the second prayer offered by the plaintiff, and in giving the instruction in lieu of that prayer.

The remaining question is, whether the plaintiff was entitled to recover any damages for the occupancy of the ground, by the cord wood of the defendant, within the limits of the public road, running by the river shore over the land of the plaintiff. This question was presented by the third prayer of the plaintiff, which was refused by the court.

The existence of an ordinary highway over the land of an owner, whether it had its origin by condemnation, dedication or prescription, does not divest him of the property in the soil. In such case he has full dominion and control over the land, subject to the easement in the public, and he may recover it in ejectment, or bring an action for trespass against any person who deposits wood, stones or rubbish upon the soil, or otherwise infringes upon the ordinary proprietary rights of the owner of the soil, in a manner not in the use of the easement as a highway. This is a principle so familiar

and so well established that it hardly needs the citation of authorities to support it. We may refer however to 3 Com. Dig. Chimin (A 2), 30; *Lade* v. *Shepherd*, 2 Str. 1004; *Dovaston* v. *Payne*, 2 Sm. L. Cas. 90, 94, 95, and note of American editors, 184; *Jackson* v. *Hathaway*, 15 Johns. 447; *St. Mary Newington* v. *Jacobs*, L. R., 7 Q. B. 47, 53; 3 Kent Com. 432, 433; Washb. Easm. 228, 229. And such being the case, it would seem proper that the plaintiff's third prayer should have been granted. It was simply a question as to how much such use and occupation of the ground was worth, under the circumstances of the case, or in other words, what damage was sustained by the plaintiff by reason of having the wood of the defendant piled upon his land. This is the injury to the land of which the plaintiff complains.

The judgment will be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

Peabody Heights Company v. Sadtler.

(63 Md. 533.)

Deed — boundary — side of road.

A deed of a lot bounded by stones "on the side of a road," and answering the call for quantity without including the road, does not convey to the center of the road.*

EJECTMENT. The case is thus stated by Bryan, J.: "An action of ejectment was brought by the appellant against the appellee. It was tried before the court without a jury, and the questions in the case depended on the construction of two deeds of conveyance. Harry Dorsey Gough and his wife were seized in fee of a tract of land in Baltimore county called Huntington, which in the latter part of the last century they divided into lots, with roads running along their sides and between them. The appellee became entitled, by valid conveyances, to lots on each side of one of these roads; and the road having been closed many years, he claims title to the bed of it lying between his two lots. He deduces his title from Charles R. Carroll, who had become entitled to all the estate

*To same effect, *Kings Co F. Ins. Co.* v. *Stevens* (87 N. Y. 287), 41 Am. Rep 361. But see *Sleeper* v. *Laconia* (60 N. H. 201), 49 Am. Rep. 311.

of Gough and wife to the said lots, and also to such interest as they had in the bed of the road between them. In 1839 Carroll conveyed to Philip B. Sadtler one of these lots which was bounded on one side of the road in question, and in 1844 he conveyed to Robert G. Ware a tract bounding on the other side of the road, which included the other of these lots. The agreement of counsel states that the road is 'now closed, and right of way over the same by all parties abandoned.' It was, in fact, closed many years ago by order of the county commissioners of Baltimore county; the date of the order is not stated in the record, but one of the briefs states that it was passed in December, 1858. The appellee by *mesne* conveyances has been invested with such title to these lots, and the road between them as was conveyed by Carroll by the deeds above mentioned; and the appellant by virtue of a deed from Preston, trustee, dated November 23, 1882, has acquired all the title to the bed of the road, which remained in Carroll after the execution of the deeds to Sadtler and Ware. A portion of the bed of this road is the subject of this controversy. It becomes necessary to consider the effect and operation of these deeds. The deed to Sadtler describes the lot as beginning at a certain stone, planted in the presence of Sadtler, James Carroll, and Charles R. Carroll on the south-west side of a road leading to Thomas L. Emory's, and running from said stone, along and with the said road, etc., to another stone, planted in the presence of the said parties on the south-east side of another road, then with said last mentioned road, etc., to another stone, planted on the north-east side of another road, thence with the said last mentioned road, etc., to a stone., etc. The deed states that the description is taken from an original plat of a part of Huntington, made out and signed by James Baker on the sixteenth day of May, 1809, and lodged in the clerk's office for Baltimore county for safe-keeping; it also states that 'the roads mentioned in the lot as above sold to Philip B. Sadtler were laid out for the accommodation of the purchasers of the Huntington property, and the said plat, so made out by James Baker, shows the location of the said roads.' The corners of this lot are distinctly marked by stones, and the lines connecting the corners are run in straight courses; and the quantity of land conveyed is said to be eighteen acres three-quarters and twenty-one perches, more or less; and the consideration is stated to be $130 an acre." The defendant had judgment below.

Winfield J. Taylor, for appellant.

Frederick W. Story and *John T. Morris*, for appellee.

IRVING, J. The facts of this case are sufficiently stated by Judge BRYAN in his opinion; but in addition to this statement of the view of the majority of the court, from which he dissents, it seems important to add a few words in further explanation of the ground upon which they rest the reversal of the decision by the court below.

The deed, upon which the question arises, falls squarely within the qualification of the general rule as it is stated by Chancellor KENT, and by Angell in his book on Highways, in the quotations made from those authors by Judge BRYAN. We do not think a better illustration of the exception made by those authors, to the ordinary rule, that when land is bounded by a road, it goes to the middle thereof, could be found, than that which is supplied by this deed. To our apprehension a clear and unmistakable intention is expressed that the title shall not extend to the middle of the road. Bounders were settled by the side of the road by the parties (in each other's presence), and the deed calls for those bounders, and the lines end at them. By literal and exact description the road-bed is excluded. The precise quantity of land contained within the metes and bounds thus given is minutely stated and paid for accordingly at a certain rate per acre. By restrictive language the grantee is confined within certain well defined boundaries. The recital of the fact that the road which was mentioned was laid out for the "accommodation" of the lot owners, clearly implies that the use only of the road was to be accorded by way of "accommodation," and that the road-bed was not conveyed. This inference is irresistible. Had another intention existed, very different language would have been employed. If the opening of the road was not the act of the owner of its bed, there would have been no mention made of it, but the road would have been included in the conveyance. The allowance of its use was to be outside of and independent of the grantor's title by the deed. In an action to recover possession by the grantor under the deed, being put by the pleadings to location, the calls by all Maryland authorities would control and the lines could not be extended beyond the bounders (unless there was language expressly or by necessary implication re-

quiring such extension, which we cannot find). This title paper is wholly unambiguous, and no room is left to theorize about intention. Its language clearly indicates the intention, and is conclusive of the question. If it was expressed in different and less explicit terms, speculation as to the probability or improbability of the road-bed ever becoming valuable, and its effect on the grantor's mind, might aid in getting at the intention, and in construing an obscure paper. But such unequivocal terms of description are used in defining what was sold, and granted, as to unavoidably exclude the road-bed from the grant; and we see nothing to justify a construction which will include it.

Judgment reversed and new trial awarded.

BRYAN, J., dissented.

CASES

IN THE

SUPREME COURT

OF

KANSAS.

AVERY v. AVERY.

(33 Kans. 1.)

Marriage — divorce — "extreme cruelty."

SUFFICIENTLY reported, 51 Am. Rep. 736.

LIMEKILLER v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

(33 Kans. 33.)

Administrator — foreign — action for death by negligence.

An administrator appointed in another State cannot maintain an action in Kansas for the negligent killing of his intestate where he cannot maintain such an action under the law of the State of his appointment.*

ACTION for negligent killing of plaintiff's intestate. The opinion states the case.

*See *Debevoise* v. *N. Y., etc., R. Co.* (98 N. Y. 377), 50 Am. Rep. 688.

Byron Sherry, *W. A. Harnsberger*, and *W. D. Webb*, for plaintiff in error.

B. F. Stringfellow, and *N. O. Borders*, for defendant in error.

HORTON, C. J. Although the record in this case is an extensive one — embracing seventy printed pages — it is necessary for us to refer only to the ruling of the District Court upon the plaintiff's demurrer to the fourth defense set up in the amended answer of the railroad company. This, in our view, is decisive of the case. The plaintiff is the administratrix of the estate of the deceased under appointment from the probate court of Platte county, in the State of Missouri. She is an officer of the law of the State of her appointment, and therefore her powers are limited by the statutes of Missouri, and they cannot be changed or enlarged by the authority of the laws of this State, nor by any judicial construction of our courts. An administratrix takes only such powers as are conferred by law, and is merely an agent or trustee acting immediately under the direction of the law regulating her conduct and defining her authority. *Collamore* v. *Wilder*, 19 Kans. 67. In this State, the remedy, when death ensues from the wrong done, is by action in the name of the personal representative of the deceased, and the amount recovered will be for the benefit of the widow and children, if any, or next of kin. *City of Atchison* v. *Twine*, 9 Kans. 350; Civil Code, § 422. In Missouri, the personal representative of the deceased has no power to institute an action of this character. In that State, the action is to be brought: First, by the husband or wife of the deceased; or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. 1 Rev. Stat. of Missouri, 1879, §§ 2121, 2122, 2123, pp. 349-351.

The fourth defense of the answer alleges that the administratrix of the estate of the deceased is prohibited by the law of the State of Missouri from instituting, maintaining, or prosecuting such an action. 1 Rev. Stat. of Missouri, 1879, ch. 1, art. 5, §§ 94, 95, 96, p. 16. See also §§ 2121, 2122, 2123, *supra*. If the death

of the deceased had been caused by the wrongful act of the defendant in Missouri, plaintiff, as administratrix, could not have maintained this action in that State, and as administratrix she is not entitled to any greater power or rights in Kansas than she is in Missouri, under the statutes of which State she holds her appointment. This action was therefore improperly brought by the plaintiff as administratrix of the estate of Frederick Limekiller, deceased, and the court erred in sustaining the demurrer. *McCarthy* v. *R. Co.*, 18 Kans. 46; *Land Grant Ry.* v. *Comm'rs of Coffey Co.*, 6 Kans. 245.

On the part of the plaintiff, it is contended that the right of a foreign administratrix to maintain such an action as this has been settled in *K. P. Ry. Co.* v. *Cutter*, 16 Kans. 568, and *Perry* v. *R. Co.*, 29 Kans. 420. The decision in *Ry. Co.* v. *Cutter, supra*, and the language used in *Perry* v. *R. Co., supra*, referring to the right of a foreign administrator or administratrix to prosecute in the courts of this State an action of this nature, was based upon the supposition that the authority of the foreign administrator or administratrix was the same under the statute of the State where appointed, as under the laws of this State, and therefore under the rules of comity, a foreign administrator was allowed to exercise in this State all the powers which he or she exercised in his or her own State, not repugnant to the laws, nor prejudicial to the interests of this State. But it has never been decided by this court that on account of courtesy, or for any other reason, a foreign administrator or administratrix could exercise in this State powers which he or she could not exercise in his or her own State. *Land Grant Ry.* v. *Comm'rs of Coffey Co., supra.* In the case of *K. P. Ry. Co.* v. *Cutter, supra*, the law of Colorado relating to administrators was not pleaded in the answer or referred to in the case; that decision was rendered upon the theory that the Colorado statute contained a provision similar to section 422 of our Code. In *Perry* v. *R. Co., supra*, the language of the court, "that an administrator appointed in another State can maintain an action in this State under section 422 of the Code," was based solely upon the authority of *K. P. Ry. Co.* v. *Cutter, supra.*

Finally, if it be urged that under this construction of the law and the decision of *Perry* v. *R. Co.*, 29 Kans. 420, there can be no party having a legal right to maintain an action of this character, where a resident of another State, whose death is caused by the

wrongful act of another in this State, dies without leaving any estate or assets in this State, we answer that we do not make the law. If there is any omission in the statutes, the remedy is with the legislature. Instead of requiring the instituting of an action in the name of the personal representative of the deceased, where death ensues from the wrong done, the legislature can authorize an action to be maintained in the name of the widow or children, if any, or in the name of some one next of kin to the deceased.

The order of the District Court sustaining the demurrer was erroneous, and therefore the judgment must be reversed, and the cause will be remanded for further proceedings in accordance with the views herein expressed.

Judgment reversed and cause remanded.

All the justices concurring.

Clark v. Board of Commissioners of Montgomery County.

(33 Kans. 202.)

Election — ballots — intention of voters.

At an election concerning the issue of county bonds, it was prescribed that the voters in the affirmative should write or print on their ballots the words "for the bonds," and those opposed, "against the bonds." Certain ballots were cast on which had been printed, "for the bonds," but a pencil mark had been drawn through those words, and immediately underneath was written in pencil, "against." *Held*, that they should be counted in the negative.

INJUNCTION refused below. The opinion states the case.

Kirkpatrick & Vestal, for plaintiff in error.

Dunkin & Chandler and *J. D. McCue*, for defendant in error.

JOHNSTON, J. At an election held on November 4, 1884, the electors of Montgomery county voted upon a proposition to issue $50,000 in the bonds of that county, to be used in the building of a court-house and jail. When the vote was canvassed the board of canvassers found that there had been 2,683 votes cast in favor of the proposition, and 2,652 against it, and accordingly declared that the proposition had been adopted. E. B. Clark, who is an elector

of that county, for the purpose of contesting that election, instituted this proceeding, and upon his verified petition and affidavits, applied to the judge of the District Court for a temporary injunction restraining the board of county commissioners from issuing the bonds declared by them to have been voted. The application was refused, and the plaintiff assigns the refusal as error. The controversy in this case arises over seventy-six ballots cast in two election precincts, which the plaintiff claims should have been counted against the proposition, but which the election boards refused to count, because of their informality.

It will be noticed that the vote was taken upon the day of the general election. The ballots rejected by the election boards had printed thereon and at the bottom of the ballots and underneath the names of the candidates for National, State and county officers, the words, "For the bonds." A pencil-line had been drawn through these words, and immediately beneath the word so marked was written in pencil the word "Against." The order of the board of county commissioners submitting the question to the electors of the county, provided that all those voting in favor of the proposition should have written or printed on the ballots the words, "For the bonds," and those voting against the proposition should have written or printed on their ballots the words, "Against the bonds." If the rejected ballots had been counted as negative votes the proposition was defeated by a majority of forty-five votes.

On the hearing before the District judge it was agreed that the only question to be decided was, whether the ballots which were cast as above stated should be counted against the proposition; and this is the question submitted to us. The leading consideration, and the one on which the decision of the case must turn is, what was the will of the electors casting these ballots? In determining the intention of voters, election boards as well as courts should be guided by the language of the ballots cast, interpreted in the light of the circumstances surrounding the election. If the terms used by the voter upon his ballot are so vague and uncertain as not to disclose his purpose, it should be rejected; but on the other hand, if the terms, employed by him on his ballot, though not technically accurate, are such as to make known his will beyond a reasonable doubt, effect must be given to it. *State* v. *Metzger*, 26 Kans. 395, and cases cited; McCrary on Elections, ch. 7.

It is conceded by counsel not to be imperative that an elector, in voting upon the proposition to vote bonds, should use the exact language prescribed in the order submitting the proposition, and that any words of similar import, and which will show with a reasonable degree of certainty the intention of the voter, will be sufficient. The act of the elector in drawing a pencil-mark through the printed words which would make it an affirmative vote, clearly shows that his attention was specially called to the proposition, and that he had under advisement the question of whether he should favor or oppose it. It also shows beyond question, that he did not desire that his vote should be recorded in favor of the bonds. After he had thus expressed his purpose not to favor the bonds, while he had the subject under consideration, he writes, presumably at the same time, and with the same pencil, and immediately underneath the cancelled words, the word "Against." The word used was the controlling one in the form prescribed by the order of the board of county commissioners to express opposition to the voting of the bonds, and in its ordinary signification means opposition. Opposition *to* what? Obviously it did not refer to the candidates whose names appeared on the upper part of the ticket; in that connection it would be meaningless. The action of the voter, in writing the word "Against," was not only directly associated with his act in penciling the words relating to the bond proposition, but it was directly and closely connected with them upon the ticket.

In view of these considerations, we cannot escape the conviction that the ballots were intended as negative votes upon the proposition. Common observation shows that this is the method usually adopted by voters in scratching a printed ticket. When a voter finds upon a ticket presented to him the name of a candidate to whom he is opposed, it is usual to cancel such name by a pencil-mark and write immediately under or near to the name cancelled the name of the candidate for whom he desires to vote. Here the words to be used in expressing the elector's concurrence or dissent to the proposition were "For" and "Against," and we think there can be no reasonable doubt that it was the intention of the voter to only scratch and cancel that which would make it an affirmative vote, and adopting the usual method in scratching a ticket, he wrote in close proximity, and in connection therewith, the word "Against," and thereby it seems to us expressed his dissent to the subject in his mind, namely, the voting of the bonds.

We acknowledge the force of the defendant's argument, and recognize that this is a "border" case; but under the facts in the record, we think the will of the electors who cast the disputed ballots is fairly apparent, and that they intended to vote against the bond proposition.

From the views herein expressed, it follows that the order and judgment of the District Court must be reversed.

Judgment reversed.

All the justices concurring.

ROWAND v. ANDERSON.

(33 Kans. 264.)

Fixtures — fence — license to remove.

A fence built by one upon the land of another, under a parol agreement that the builder might remove it at will, passes with a grant of the land to a purchaser in good faith without notice of the agreement.

ACTION for value of a fence. The opinion states the case. The defendant had judgment below.

H. P. Welsh, for plaintiff in error.

A. W. Benson, for defendants in error.

JOHNSTON, J. The only question presented for our decision is, whether the fence, the value of which is sued for in this action, was owned by the plaintiff at the time of its removal by Peter Anderson and August Carlson. The fence was built by the defendant, Charles S. Anderson, upon the plaintiff's land when it was owned by S. O. Thacher, under a parol permission given by Thacher that the fence might be built a few feet over upon Thacher's land as a protection to a hedge which Anderson was about to plant on the dividing line between his own land and that of Thacher, and that it might be removed by Anderson whenever he desired. It remained upon the land about five years before its removal by the defendants. About two years after it was built, Thacher conveyed the land to one Circle, who in about eighteen months afterward conveyed to Mechem, who on May 1, 1882, conveyed to the plaintiff.

In these conveyances no reservation was made of the fence, nor had any of the purchasers holding under Thacher any notice of the arrangement between Thacher and Anderson, unless the location and use to which the fence was put imparted notice of such arrangement.

Plaintiff claims that the fence was a fixture attached to the soil which had become a part of the realty, and passed with the grant of the land to him, he being a *bona fide* purchaser without notice of the arrangement between Thacher and Anderson with respect to the erection and removal of the fence.

On the part of the defendants it is claimed, that as between Thacher and Anderson, the fence was personal property, and that its character was not changed by the subsequent conveyance of the land by Thacher, and did not pass as an incident of the land by the conveyance to the subsequent grantees. It is further claimed that the plaintiff was not a purchaser without notice; that the location of the fence and its use were sufficient notice that the defendants claimed an interest in it, and that that interest could have been ascertained by the inquiries that plaintiff was in law bound to make.

We cannot agree with the claim made by the defendants. The general rule of law is that whatever is once actually annexed to the freehold becomes a part of it, and cannot afterward be removed except with the consent of the land-owner. In this case the fence was a substantial structure made of boards, and was actually annexed to the soil. All improvements of a permanent character, such as fences and buildings that are firmly attached to the soil, are generally to be regarded as permanent fixtures, and are presumed to belong to the owner of the soil to which they are attached. *Prima facie* then the fence was real estate belonging to the owner of the land on which it stood, and if the plaintiff had no knowledge or notice of the arrangement between Thacher and Anderson, he had a right to presume that the fence was intended as a permanent improvement, the title to which was in the owner of the land, and that a deed of the land from Mechem, the grantor, would carry with it the fence in question.

To the general rule there are exceptions. The agreement of the parties may, to a certain extent, supersede the general rule of law. An exception to the rule may also arise by reason of the relations that the parties to a controversy over the removal of fixtures sustain toward each other, and articles attached to the freehold which

are considered as removable by one party may be regarded as permanent fixtures with respect to another. There is considerable disagreement in the decisions of the courts with respect to how far the doctrine of modifying the general law of fixtures, by agreement, may be carried. Some of the cases would seem to go to the extent of holding that parties may, by agreement, change the nature of property, and make that which would otherwise be a part of the realty, personal property, and that a purchaser of the realty would be bound by such agreement, even though he had no notice of the same. Others of them are to the effect that the distinctions between realty and personalty cannot be changed by the mere agreement of the parties, and that a purchaser of real estate, in the absence of notice to the contrary, has a right to suppose that he takes with it every appurtenance which, under the general rules of law, passes with the grant of land, and that he cannot be affected by any secret claim or private agreement of which he has had no notice. It may be conceded that a party, who under a parol permission or license, places upon the land of another a permanent improvement, with the right, when he desires, to enter and take it therefrom, may exercise that right at any time before the permission or license is revoked by the land-owner, and probably he has the right to enter to remove the fixture within a reasonable time after the revocation; and it would seem that any subsequent vendee who purchased the land with notice of such parol agreement or license, and of the interest of the parties in the fixture, would be bound by such agreement. But we think this doctrine cannot be carried to the extent of binding or affecting injuriously third parties to whom the land has been conveyed without reservation, and to whose notice the parol license had not been brought.

While the legal effect of attaching a permanent improvement like a fence to the land of another may be controlled by an agreement as between themselves and those who have knowledge of such agreement, yet we think the weight of authority is that such an annexation to the land becomes a fixture which cannot be held or removed as against a subsequent vendee who had no notice of the license or agreement under which it was annexed to the land. In such case, the remedy of the licensee is against the licensor for the breach of the executory agreement, by virtue of which the annexation was made. The policy of the law in our State is that everything appertaining to or affecting the title of real estate should appear

in the public records. A purchaser of real estate has a right to suppose that upon an inspection of the records he will be able to ascertain the status of the title, and whether there are any existing incumbrances or claims in favor of third parties existing against it. Not so however, if the theory contended for by defendants obtains.

As has been said, this doctrine "would always leave the purchaser in doubt as to the true state of the title to the property which he was purchasing, or the nature and extent of the claims which third persons might have upon it. The town record would give him no light upon the subject. The principal value of the property might be in the buildings, and the purchase made solely with reference to them, and yet after the bargain was completed and the consideration paid, he might find that a third party owned the buildings with the right to have them remain or to remove them." *Powers* v. *Dennison*, 30 Vt. 752.

The court in the case cited in passing upon a question very similar to the one presented in this case, that is, where one had erected a building for his own use upon the land of another, by virtue of a parol license from the owner, with the understanding that the licensee might remove it upon notice from the land-owner, and the land was subsequently conveyed, held that "whatever may be the rights or the nature of the interest in respect to such property as between the original parties to the contract, it is sufficient to say that it seems to be well settled that a building erected as the one in question was, would become a fixture and a part of the freehold, so as to pass by the deed of the owner of the land to a *bona fide* purchaser without notice."

In this case, Anderson voluntarily placed his fence in such a situation as to lead those who had no knowledge or notice of his arrangement with Thacher to believe that it belonged to him on whose land it was situate. If he desired to protect his fence from the effect of a conveyance of the land by Thacher, he might have reduced the agreement between them to writing, and made it a matter of record. This he neglected to do, and if any one is to suffer loss by reason thereof, it should be the one who was negligent, rather than a subsequent vendee, who upon an examination of the records found no record and had no notice of this claim. In support of the views herein expressed, we cite the following authorities: *Prince* v. *Case*, 10 Conn. 375; *Powers* v. *Dennison*, 30 Vt. 752;

Westcott v. *Delano*, 20 Wis. 541; Tiedeman Real Prop. 799; Hill Fixtures. 19; *Houx* v. *Seat*, 26 Mo. 178; Tyler Fixtures, 672; *Dostal* v. *McCadden*, 35 Iowa, 318; *Smith* v. *Carroll*, 4 G. Greene, 146; *Haven* v. *Emery*, 33 N. H. 66; *Eaves* v. *Estes*, 10 Kans. 314.

[Question of notice omitted.]

Entertaining these views the judgment of the District Court must be reversed, and the cause remanded with instructions to enter judgment in favor of the plaintiff for the value of the fence, which it was agreed was $60.

Reversed and remanded.

All the justices concurring.

DOUTHITT v. APPLEGATE.

(33 Kans. 395.)

Fraud — obtaining property by promise to marry — public policy.

A woman fraudulently, and without intending to fulfill her promise, by false professions of love, and by false pretenses of wealth and by a promise to marry the plaintiff, and by the pretense that it was necessary to silence the opposition of her children, induced the plaintiff to convey land to her, with the further agreement that after the marriage she would convey it to a certain other person. The man was already married at the time of the agreement, but had procured a divorce before the execution of the deed. *Held*, that the deed should be set aside.

ACTION to set aside deed. The opinion states the case. The plaintiff had judgment below.

S. H. Allen and *J. H. Sallee*, for plaintiff in error.

W. R. Biddle, for defendant in error.

VALENTINE, J. This was an action brought in the District Court of Linn county, by William Applegate against Elizabeth H. Douthitt, to set aside a deed of conveyance, and to quiet his title to certain real estate. The deed was executed for the land in controversy by the plaintiff to the defendant on August 14, 1882, and the plaintiff alleges in his petition that it was procured by defendant through fraud. The facts constituting the alleged fraud are in substance

and in brief as follows: The defendant, being a designing and crafty woman, induced the plaintiff, by ardent professions of love and affection, to visit her at her home in Bourbon county. He became very much enamored of her, and visited her frequently. She, designing to defraud him of his property, falsely represented that she was wealthy, falsely professed great love and affection for him, and promised to marry him. She asked him to deed his property to her in order to stop the opposition, as she stated, of her children to their marriage, and promised to deed the land to Fannie C. Shoe when they were married, and that he should not be poorer for the same, but should be richer. The plaintiff believed that she was sincere in all her professions of love and affection, and in all her promises, and relied upon the same, and he deeded the land to her for no other consideration; but in fact she was not sincere, and never had any intention of marrying him or performing any of her promises, and afterward refused to marry him and to perform her other promises. He also had much personal property, which he disposed of, and then gave her the proceeds.

The defendant answered to this petition, denying all the allegations of the plaintiff's petition charging fraud against her, and set up that she procured the title to the land in controversy from the plaintiff in good faith and for a valuable consideration. The action was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and rendered judgment thereon in favor of the plaintiff and against defendant, and the defendant, as plaintiff in error, now seeks a reversal of such judgment.

The plaintiff in error, defendant below, claims that no cause of action was either alleged or proved against her in the court below. On the trial of the case in the court below, she objected to the introduction of any evidence under the petition, on the ground that the petition did not state facts sufficient to constitute a cause of action; and after the plaintiff had introduced all his evidence and rested, she demurred to the evidence upon the ground that the evidence did not prove any cause of action; and after all the evidence was introduced, and after the court had made its findings of fact and conclusions of law, and rendered its judgment, the defendant moved to set aside the same and for a new trial, upon the ground that the findings, decision and judgment were not sustained by sufficient evidence, and were contrary to law. The plaintiff in error,

defendant below, also raises some other questions in this court, all of which we shall consider in their order.

We think the petition of the plaintiff below states facts sufficient to constitute a cause of action. We have already given the substance of the petition, but the facts are stated therein in much greater detail, and more elaborately than we have given them, and there are also other facts stated therein which we have not given. Judge Story says: "Where the party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the terms. There is an evil act with an evil intent; *dolum malum ad circumveniendum.* And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions." 1 Story Eq. Jur., § 192.

Mr. Perry says: "Whenever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped or surprised into a conveyance of the legal title to his property, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and will order him to account upon equitable principles, and to make a reconveyance of the property." 1 Perry Trusts, § 171.

But the specific objection made to the petition by the plaintiff in error, defendant below, is that it shows that the plaintiff below executed the deed with the understanding that the defendant was afterward to transfer the title to Fannie C. Shoe. It is claimed that if the property was transferred to the defendant, in trust for Fannie C. Shoe, the plaintiff can have no further interest in the property, and therefore that he cannot maintain an action with reference thereto. We think however that the understanding of the parties that the defendant was to convey the property to Fannie C. Shoe can make no difference. If the plaintiff was induced to part with his property through the fraud of the defendant, by false promises, elusive hopes, and deluding expectations, held out by her to him, that his condition, financial, social, and otherwise, would be bettered and improved thereby, it makes but little difference whether it was understood by the parties that the property

should ever be reconveyed to him or not. The fraud vitiates the whole transaction, and the parties should be placed back as near to their original condition as possible.

The principal objection to the plaintiff's evidence is that it showed that during a large portion of the time while the plaintiff and the defendant were negotiating with each other with respect to the land, the marriage, etc., the plaintiff was a married man, and therefore all their arrangements or understandings with regard to marriage, or founded thereon, were illegal and void. And it is further claimed that no competent evidence was introduced tending to show that the plaintiff was ever divorced. Now these questions were not raised by the pleadings; and there is nothing in the record indicating that these exact questions were raised at any time in the court below. In all probability they were not raised in that court before the judgment was rendered, even if they were then raised; for the entire defense upon which the defendant relied was that she was a *bona fide* purchaser of the property; hence these questions must now be looked upon with great disfavor.

It is true that at the time when the plaintiff and the defendant commenced negotiations with each other the plaintiff was a married man; but this appeared for the first time upon the trial, and only by the evidence; and it also appeared by the evidence that prior to the conclusion of their negotiations the plaintiff had obtained a divorce. His divorce was granted on August 2, 1882, while the deed to the property was not executed until August 14, 1882.

[Minor questions omitted.]

It should have been made when the evidence was offered to be introduced. As the divorce was granted twelve days before the deed was executed, and as the deed was executed for the reasons and consideration set forth in the plaintiff's petition, it was not executed for such an illegal or wrongful consideration as will preclude the plaintiff from obtaining the relief which he now seeks. At the time when the plaintiff executed the deed he had a right to contract with reference to a future marriage. It was not then illegal, or immoral, or against public policy, for him to do so. Hence no good reason can now be given why the relief asked for by the plaintiff should not be granted. He is not attempting to enforce an illegal contract. Indeed he is not attempting to enforce any contract. He is not attempting to

enforce any illegal or immoral transaction; and indeed he is not attempting to enforce any transaction. His desire is not to enforce something, but it is to undo and repudiate something that has already been done. He wishes to undo and repudiate all that was done between himself and the defendant with regard to the land.

But it is claimed that he cannot maintain a suit in equity to undo this transaction, because the same is and was illegal, *contra bonos mores*, within the maxim *ex turpi causa non oritur actio*; and that he himself was a *particeps criminis* and *in pari delicto*. This is not correct; for as we have before stated, at the time when the deed was executed the plaintiff and the defendant had the right to contract with reference to marrriage. The entire transaction might then have been innocent, and in harmony with law, with public policy, and good morals. The defendant acted fraudulently; but the plaintiff, having no knowledge of her fraudulent intentions, was, in legal contemplation, innocent. It may be true that he acted foolishly; that he violated some of the rules of propriety, and that his actions were not the most commendable; but in legal contemplation, he acted innocently, and was simply the innocent victim of a villainous fraud, deliberately planned and artfully executed by the defendant. For the purposes of this case, we shall consider that all the transactions had between the plaintiff and the defendant, prior to the time when the plaintiff obtained a divorce, were in violation of good morals and public policy, and were therefore void; but these transactions will not defeat the plaintiff's right to recover, for he has no need of any aid from them in the prosecution of his action. After the divorce was granted, and upon the theory of the nullity of all the prior transactions, both parties were then free. Each had the power to contract for the future marriage, and neither was bound to marry the other. Each was at liberty to repudiate all that had previously been done, and each was at liberty to enter into new negotiations. The only transactions, then, which we need now to consider, are those had after the divorce was granted; and these are sufficient for the plaintiff to found his cause of action upon.

It is said in the brief of counsel for plaintiff in error, defendant below, that "the test, whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of the illegal transaction to establish his

case;" and the case of *Holt* v. *Green*, 73 Penn. St. 198; s. c., 13 Am. Rep. 737, is cited as authority. This we think is a correct statement of the law on the subject; but the plaintiff in this case does not require the aid of any illegal or immoral transaction to establish his case. The foundation for his case need not go further back than to the time when he procured his divorce. Also in this connection, see the case of *Stout* v. *Ennis*, 28 Kans. 706. While inadequacy of price is never alone sufficient to establish fraud, yet it may often be shown along with other evidence as tending to show fraud.

Where the question as to whether a money consideration was paid for a deed, or not, is presented for consideration to the trial court, the business transactions and financial condition of the parties about the time when the deed was executed, and when it is claimed the consideration was paid, may sometimes be shown as tending to show whether it was probable that a money consideration for the deed was paid or not. There are still other reasons however in this case rendering such evidence competent. We think there was sufficient evidence to sustain all the material findings of the court below. Taking the testimony of the plaintiff alone, there is but little room to question the correctness of the findings, and there was but little evidence tending to impeach his testimony except that of the defendant; and taking into consideration the improbability of much that she said, and her bad reputation for truth and veracity, the court was justified in excluding all her testimony.

Finding no material error in the rulings and judgment of the court below, the judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

BIRDZELL v. BIRDZELL.

(33 Kans. 433.)

Marriage — divorce — action by guardian of insane party.

The guardian of an insane woman may not maintain an action against her husband for divorce or alimony.*

DIVORCE. The opinion states the case. The plaintiff had judgment below.

E. Hill and *Rossington, Johnston & Smith*, for plaintiff in error.

W. P. Campbell, for defendant in error.

VALENTINE, J. This was an action brought by John Tucker, in the name of "Margaret Birdzell, by John Tucker, her guardian," against Caleb J. Birdzell, to obtain a divorce on the part of Margaret Birdzell, an insane woman, from her husband, Caleb J. Birdzell, and for alimony. The case was tried before the court, without a jury, and the court refused to grant the divorce for the reason that it deemed itself powerless to grant a divorce to an insane person, but granted the alimony for the gross amount of $5,000, and decreed that the same should be a lien upon the homestead of the plaintiff and the defendant. The court also decreed that the homestead should be sold to satisfy the judgment for alimony, and that a general execution might afterward be issued against the property generally of the defendant to satisfy any remainder that might still be due upon the judgment, and decreed that said allowance of $5,000 should be in full of all claims that might ever be made by the plaintiff upon the defendant or upon his estate. After this judgment was rendered, and after a motion for a new trial was made and overruled, the defendant, as plaintiff in error, brought the case to this court, and he now asks for a reversal of such judgment.

Several questions are presented to this court, but we think a decision of the first and principal question in the case will render it unnecessary to consider or decide any of the other questions raised. Such first and principal question is, whether an action for divorce

* *Contra: Baker* v. *Baker*, 5 P. Div. 142; 6 P. Div. 12.

and alimony, or for alimony alone, can be brought and maintained by the guardian of an insane woman. It seems to be almost admitted by counsel for the defendant in error, plaintiff below, that the action for divorce cannot be maintained; but such counsel still insists that an action for alimony can be maintained. It seems however clear to us that both actions must be placed in the same category. We shall consider the question with reference to divorce first.

Marriage is a personal status and relation assumed for the joint lives of the parties, and can never be created or brought into existence except with the free and voluntary consent of the parties assuming the same, and it can never be dissolved or destroyed while both parties are living, so as to affect an innocent party thereto, except for a grievous and essential wrong committed against such relation by the other party, and with the free and voluntary consent, and indeed with the active and affirmative volition of the wronged and innocent party. In other words, the marriage status and relation of an insane person, who has given no cause for a divorce, cannot be dissolved or abrogated at all, for it cannot be dissolved or abrogated except with the voluntary consent of such insane person, and such insane person is incapable of giving any consent to such a dissolution or abrogation. How could a guardian conduct the mind of his insane ward through the ceremony that would make him or her a husband or wife, or how could he conduct such mind through a litigation that would undo the marriage relation? Marriage might be ever so beneficial to the ward, financially or otherwise, but as it depends upon the intelligent volition of the party to be married, the guardian could not effect it; or if it existed, he could not inaugurate and conduct a proceeding that would destroy it. There are no wrongs that may be committed by a husband or wife sufficient in and of themselves to work a dissolution of the marital ties. The injured party may be willing to condone the wrong, or for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong. In the present case, some of the wrongs charged against the defendant existed prior to the insanity of the plaintiff. Can the guardian say that she did not condone them? Many persons believe that marriage is a sacrament, and that to procure a divorce upon any of the ordinary grounds for which divorces are usually granted is a violation of all true religion and morality. Should such a person be

divorced, though innocent himself or herself, without his or her consent? And could a guardian for such a person, if he or she should become insane, give the necessary and required consent? Besides, insanity is often temporary, and what if such insane person should become restored to sanity immediately after the divorce, and should disapprove the divorce and all the proceedings connected therewith? Whether a party who is entitled to a divorce shall commence proceedings to procure the same, or not, is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person. As sustaining the foregoing views, we refer to the following authorities: *Worthy* v. *Worthy*, 36 Ga. 45; *Bradford* v. *Abend*, 89 Ill. 78; s. c., 31 Am. Rep. 67; 2 Bish. Marr. and Div., § 306*a*; also, § 641 of the Civil Code provides, that "the petition (for a divorce) must be verified as true by the affidavit of the plaintiff." An agent, or attorney, or guardian, is not mentioned. See *Baker* v. *Knickerbocker*, 25 Kans. 290. Also both parties are allowed to testify in divorce cases. Laws of 1871, chap. 116, § 6; Comp. Laws of 1879, chap. 80, § 651*a*.

We now come to the question of alimony. May the guardian of an insane wife commence and maintain an action against the husband for alimony? There is no statute in this State that in terms authorizes any such thing, and we think the implications of the statutes are all against it. Alimony may be allowed as an incident to a divorce, or it may be allowed in a separate action and without a divorce. What we have already said in this opinion with reference to divorce will dispose of the question as to whether the alimony may be granted as an incident thereto. We shall now proceed to consider the question whether it may be granted without a divorce. The statute providing for alimony without a divorce reads as follows:

"SEC. 649. The wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the District Court, for any of the causes for which a divorce may be granted. The husband may make the same defense to such action as he might to an action for a divorce, and may, for sufficient cause, obtain a divorce from the wife in such action." Civil Code, § 649.

It will be seen that alimony without a divorce may be obtained only for the same causes for which a divorce may be obtained. Now

we have just held that an insane woman cannot obtain a divorce, for the reason that she cannot exercise her choice or election to do so; and that her guardian cannot do so for her. The statute also provides that "the husband may make the same defense to such action as he might to an action for a divorce;" and we have just held that the husband may, where the wife is insane, defeat the action for divorce. The statute also provides that the husband "may, for sufficient cause, obtain a divorce from the wife in such action." Now can a husband obtain a divorce from an insane wife? Can a guardian defend for her? She has a right to testify in a divorce case. Could her guardian supply this testimony? A part of the grounds for divorce and alimony in the present case existed before the plaintiff became insane. Can the guardian say that she did not condone the wrongs upon which these grounds rest? In this State there is no such thing as a divorce *a mensa et thoro*, or merely from bed and board. The plaintiff and defendant are still husband and wife, absolutely and entirely. She will inherit from him, or he from her, at least one-half of the other's estate, notwithstanding the judgment of the court below, and the husband is still liable for her support. And there are better remedies to enforce this support than the strange one resorted to in the present case. There are all the common-law remedies. And there are the still further remedies furnished by sections 13, 43, 44, 45 and 46 of chapter 60 of the General Statutes. Comp. Laws of 1879, ch. 60, §§ 13, 43 to 46. Besides could the homestead be sold without "the joint consent of the husband and wife?" Const., art. 15, § 9. The husband has not consented, and when the wife is restored to sanity, as she may be, she may claim that she has never consented; and of course she has not consented.

After a careful consideration of this case, we have come to the conclusion that the guardian of an insane woman cannot maintain an action against her husband for alimony.

The judgment of the court below will be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

Reversed and remanded.

HORTON, C. J., concurring; JOHNSTON, J., not sitting.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. WEBER.

(33 Kans. 543.)

Carrier — passenger becoming sick — removal.

Where a railway passenger has *delirium tremens*, annoys and frightens the other passengers, and becomes insensible, he may be removed at a station and put in charge of an overseer of the poor.

ACTION for death of plaintiff's intestate. The opinion states the case. The plaintiff had judgment below.

A. A. Hurd, Robert Dunlap, Mills & Wells and *Geo. W. McCrary*, for plaintiff in error.

Everest & Waggener and *Webb & Martin*, for defendant in error.

JOHNSTON, J. The plaintiff, who is the personal representative and brother of Philip Weber, deceased, brought this action in the District Court of Atchison county, in behalf of the next of kin, to recover the damages suffered by them in the death of Philip Weber, caused, as plaintiff alleges, by the wrongful act and neglect of the railroad company. The verdict and judgment were in favor of the plaintiff, and the defendant comes here assigning error on several exceptions that were taken during the trial.

[Minor questions omitted.]

The testimony is, that upon the arrival of the train at Newton, a special policeman of that city, who was doing duty at the station of the railroad company, with the assistance of others, removed Weber, who was then in an unconscious state, from the train. The train remained at the station about ten minutes. Within a few minutes after he was removed, and within ten minutes after the arrival of the train and before its departure, Weber was turned over to and placed in charge of the city marshal and overseer of the poor. Henry Meyer, who was the overseer of the poor, says that he took charge of him within from eight to ten minutes after the train came in, and immediately sent for a physician, and made effort to find a hotel or boarding house where he

could be received and cared for. This is in effect the testimony of several other witnesses who were there present, and in an examination of all the testimony in the record nothing is found contradicting it. Most of these findings are therefore untrue. Their materiality, when the issues and facts of the case are considered, will not be questioned. When Weber was placed upon the train at Hutchinson, his condition was unknown to the employees of the company in charge of the train. He had been in Hutchinson since the day before, suffering from the effects of the excessive use of intoxicating liquors. He was found by the officers of that city lying on one of the streets in a spasm, and as they state, apparently afflicted with *delirium tremens*. Shortly after he was placed upon defendant's train at Hutchinson, he was seized with a fit and fell from his seat upon the floor, where he struggled for some time. While going from Hutchinson to Newton, a distance of thirty-three miles, he had several such attacks. When he was out of these spasms he appeared to be somewhat delirious, and the conductor states that he tried to jump off the train. In the car he removed his shoes, complaining that they were full of bugs and worms, and conducted himself in such a way as to annoy and frighten his fellow-passengers, so that a number of them left the car and went to other portions of the train. When the train reached Newton he had fallen from his seat, and was lying in the aisle of the coach in an unconscious condition. It is clear that the conduct of the deceased justified the railroad company in removing him from its train.

It is the duty of a railway company carrying passengers, to provide for their quiet and comfort, and secure them against the annoying and offensive conduct of other passengers; and where the conduct of a passenger is such as to render his presence dangerous to fellow-passengers, and such as will occasion them serious annoyance and discomfort, it is not only the right but the duty of a railroad company to exclude such passenger from its train. *Vinton* v. *Middlesex R. Co.*, 11 Allen, 304; *Commonwealth* v. *Power*, 7 Metc. 596; s. c., 41 Am. Dec. 465; *Jencks* v. *Colman*, 2 Sum. 221; *Lemon* v. *Washington & Georgetown R. Co.*, 1 Mackey, 180; s. c., 47 Am. Rep. 238; *Brown* v. *Memphis & Charlestown R. Co.*, 5 Fed. Rep. 499; s. c., 1 Am. & Eng. R. Cas. 247; *R. Co.* v. *Statham*, 42 Miss. 607.

And under the authorities, it seems that it is equally the duty of

the railroad company to remove from the train and leave an unattended passenger, who, after entering upon a journey, becomes sick and unconscious or insane, until he is in a fit condition to resume his journey, or until he shall obtain the proper assistance to take care of him to the end of his journey. In this case, considerations for the fellow-passengers, as well as for the health and comfort of Weber himself, required that the railroad company take him from the train.

In regard to Weber's condition with respect to completing his journey, the jury made the following findings:

"Was he in a fit condition to travel on defendant's train without injuring himself? A. Think not.

"Was not Philip Weber, at the time he was removed from the train at Newton, in such a condition as to render it unsafe for him to continue his journey to Atchison, Kansas, without medical treatment, or any one to care for him? A. We think it was.

"Could not Philip Weber receive better care from the city authorities of the city of Newton than it was possible for the defendant's employees to give him on the train? A. Yes."

Under these facts the propriety of his removal cannot be doubted. The duty of the railroad company however with respect to Weber did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the cause: "Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made."

The contention of the railroad company is, that it performed its duty to this passenger, when after taking him from the train, it turned him over to the authorities of a city having 4,000 inhabitants, and well supplied with public houses, and especially when it placed him in charge of the overseer of the poor. The statute makes it the duty of an overseer of the poor of any township or city to grant temporary relief to any non-resident who may be found lying sick therein or in distress, and without friends or money, and the expense

of providing such relief is to be paid out of the county treasury. *Commrs. of Pottawatamie Co.* v. *Morrall*, 19 Kans. 141. This was the condition of Weber; he was in distress, sick and without friends or money. It became the duty of the overseer, when his attention was properly called to Weber's condition, to take charge of him, and make provision for his temporary relief. We think that if the railway company carefully and prudently removed him from the train, and promptly placed him in the care of the overseer of the poor, who received and took charge of him, under the facts of this case it has exercised that reasonable care and diligence in making provision for him that the law requires. And here the materiality of the findings in question arises. The jury found that he lay on the platform of the company's depot in an exposed condition for over an hour before he was taken charge of by the overseer of the poor, and that during that time he sustained such injuries as resulted in his death; while as we have seen, the testimony is that he was placed in charge of the overseer within a few minutes after he was removed from the train. We do not assume to decide whether or not Weber sustained any injury from exposure during the brief time that elapsed after he was removed from the train, and before he was taken in charge by the city authorities, nor whether the railroad company during that time exercised due care toward him, and due diligence in providing for his safety and comfort. But as it appears that these important findings, upon which the general verdict of the jury may have been mainly funded, are untrue, and inasmuch as the jury allowed more than nominal damages, notwithstanding a special finding that the next of kin sustained no pecuniary loss by the death of plaintiff's intestate, the verdict cannot be permitted to stand.

There are other assignments of error, but in view of the conclusion that has been reached, we do not deem it necessary to notice them.

The judgment of the District Court will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

All the justices concurring.

FEINEMAN v. SACHS.

(33 Kans. 621.)

Sale — illegal — of liquors in another State.

A sale of intoxicating liquors in Missouri, to be sold in Kansas contrary to the law of that State, may be enforced in Kansas, although the seller knew the illegal purpose of the buyer, provided he did not engage actively to promote or share in it.*

ACTION for price of intoxicating liquors. The opinion states the case. The defendant had judgment below.

W. A. S. Bird, for plaintiffs in error.

G. C. Graves, for defendant in error.

JOHNSTON, J. B. A. Feineman & Co. brought this action against Frank Sachs, to recover the price of a quantity of intoxicating liquors sold by them to the defendant, who was a saloon keeper at Topeka, Kansas. The plaintiffs are wholesale liquor dealers at Kansas City, Missouri, and they allege that on the 17th day of August, 1881, they sold on credit and shipped a bill of liquors priced at $223.33, to one G. C. Funk, at Topeka; that a short time after this sale, Funk sold out his business to the defendant Sachs, when he assumed the payment of Funk's indebtedness to the plaintiffs; that afterward the defendant purchased liquors directly from plaintiffs of the amount of $75.75, making a total indebtedness alleged to be due from defendant to plaintiffs of $299.08; that the defendant had made several payments on account to the amount of $150, leaving a balance due to the plaintiffs of $149.08, for which they asked judgment.

The defendant denied the assumption of Funk's indebtedness to plaintiffs, and claimed that when he bought Funk out a number of outstanding accounts were left by Funk with him for collection, with the agreement that the amount collected on them should be paid to Feineman & Co. upon the bill that Funk owed them. He claimed that on these accounts he collected about $75, all of which

* See *Brunswick* v. *Valleau* (50 Iowa, 120), 32 Am. Rep. 119, and note, 122; *Sprague* v. *Rooney, ante,* 383.

was paid over to the plaintiffs, and that the balance of $150, which he had remitted to the plaintiffs, was in full payment of the liquors purchased by himself from them. He made the further defense, that the liquors were sold by the plaintiffs at Topeka, Kansas, contrary to the laws of this State, and with full knowledge that they were to be resold by the defendant and in violation of our law, and therefore no recovery could be had for their price.

On the trial, a general verdict was returned by the jury in favor of the defendant.

One of the errors assigned by the plaintiffs is upon the instructions that were given to the jury. The court directed the jury that if the plaintiffs' agent took an order from the defendant for intoxicating liquors to be transmitted to the plaintiffs at Kansas City, Missouri, and there filled at their option, and to be delivered at that place to the defendant, the plaintiffs would be entitled to recover the amount unpaid thereon; but that if the sale and delivery of the liquors was made at Topeka, Kansas, no recovery could be had unless the plaintiffs had a permit authorizing such sale. The court then gave the following instruction:

"I further instruct you, that if you find as a fact that the plaintiffs' agent took from the defendant an order for intoxicating liquors in the city of Topeka, with the understanding and agreement that said order should be transmitted to plaintiffs in Kansas City, Missouri, to be there filled subject to their choice and option, and that said liquors were delivered to the defendant on the cars at Kansas City, Missouri, to be brought into this State; and if you further find that at the time of such transaction it was the understanding and agreement between the defendant and plaintiffs' agent that such liquors were to be brought into the State of Kansas, and here resold in violation of the laws of this State, and if you further find that the agreement of transmission and filling of the order at the plaintiffs' option, and the delivery of the liquors to the defendant on the cars at Kansas City, Missouri, was so made as a scheme or device for evading the laws of Kansas respecting the sale of intoxicating liquors in this State, and that such liquors were so furnished defendant in pursuance of such scheme or device to be resold in Kansas, in violation of the laws of this State, then you must find for the defendant."

Exception is taken to this instruction, upon two grounds: First, that it is not a correct statement of the law, and second, that there was no evidence in the case upon which to base such an instruction.

As an abstract proposition of law, we think the instruction is not erroneous. The plaintiffs claim that the validity of a sale and delivery of goods made in Missouri is to be determined by the laws of that State, and that as the contract in question conformed to the laws of Missouri, it cannot be affected by our laws, and must be enforced in our courts. It is true, the general rule is that the validity of a contract is to be determined by the law of the place where it is made, and if it is valid by the laws of that State, it will be enforced in another as an act of comity, even though it may not entirely consist with the laws of the State in which enforcement is sought. To this rule there are important exceptions, one of which is, that no State is bound to enforce a contract that is in contravention of its laws and which has been entered into in fraud or evasion of such laws.

It has been said that "the exception applies to cases in which the contract is immoral or unjust, or in which the enforcing it in a State would be injurious to the rights, the interest, or the convenience of such State or its citizens. This exception results from the consideration that the authority of the acts and contract done in other States, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that State, and whatever effect is attributed to them elsewhere, is from comity, and not of strict right. And every independent community will, and ought to judge for itself how far that comity ought to extend. Contracts therefore which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made." Story Confl. of Laws, § 244.

And citizens of another State who enter into an arrangement to furnish liquor with the intention and for the purpose of enabling a citizen of Kansas to violate our laws, are not entitled to any greater privilege than any one of our own citizens guilty of the same wrong. If then the transmitting of the order for intoxicating liquors to Kansas City, Missouri, and the delivering of them upon the cars at that place was, as stated by the court, a mere scheme or device of the parties to evade the laws of Kansas prohibiting the sale of intoxicating liquors, and the plaintiffs encouraged and assisted the

defendant in the illegal transaction, the courts of the State will not aid the plaintiffs in recovering the fruits of such wrongful act.

But the other exception to the instruction is, in our view, well taken. No facts are found in the evidence brought here upon which to base the instruction, and it was therefore misleading and erroneous. The most that can be claimed, as shown in the testimony, is that the plaintiffs' agent knew that the defendant had sold liquors in violation of law, and that the intention of the defendant was to dispose of those purchased from plaintiffs in the same way. There is no pretense that any act was done by the plaintiffs to promote the illegal transaction, or that they shared in its fruits beyond the taking of the order and sale of the goods for their value in the State of Missouri. It does not appear that any thing was said or done by the plaintiffs or their agent, indicating an arrangement or conspiracy with the defendant to evade the laws of the State, or with a view of facilitating and assisting the defendant in the illegal sale of the liquor, or in furtherance of his unlawful design; and while the defendant at the time of the purchase may have intended to do an unlawful business in Kansas, and that purpose may have been communicated to and known by the plaintiffs, yet the defendant might afterward change his purpose and make a proper and legal disposition of the liquors. But mere knowledge of the illegal purpose of the buyer is not sufficient to invalidate a sale made in Missouri, and which is in conformity with the laws of that State. In order to render the sale void, and defeat a recovery of the price of the liquors, there must be some participation or interest of the seller in the act itself. *Hill* v. *Speer*, 50 N. H. 253; s. c., 9 Am. Rep. 205; *Holman* v. *Johnson*, Cowp. 348; *Gaylord* v. *Soragen*, 32 Vt. 110; *Aiken* v. *Blaisdell*, 41 Vt. 656; *McIntire* v. *Parks*, 3 Metc. 207; *Smith* v. *Godfrey*, 8 Fost. 379; *Orcutt* v. *Nelson*, 67 Mass. 536; *President, etc., of the Merchants' Bank* v. *Spalding*, 12 Barb. 302; *Tracy* v. *Talmadge*, 14 N. Y. 162; s. c., 67 Am. Dec. 132.

If however there has been any participation on the part of the plaintiffs, as for instance, if the liquors were packed by the plaintiffs in such a manner as to conceal the contents of the package, and thus enable the defendant to accomplish his unlawful purpose, no recovery can be had; and if the illegal disposition of the goods by the purchaser in any way entered into the contract, and a greater price was agreed to be paid for them; or if the plaintiffs were to

derive any advantage or share in the fruits of the defendant's wrong, the contract should be held void, and not enforceable in our courts.

But as there was no testimony in the case that the plaintiffs participated, or were interested in the illegal sale of the goods, the instructions cannot be sustained. It follows that the judgment of the District Court must be reversed, and the case remanded for a new trial.

Reversed and remanded.

All the justices concurring.

CASES

IN THE

SUPREME COURT OF ERRORS

OF

CONNECTICUT.

MASON v. HAWES.

(52 Conn. 12.)

Landlord and tenant — peaceable re-entry — forcible withholding.

A landlord, entitled to repossession, may not re-enter during the tenant's temporary absence, without legal warrant, and hold forcible possession.*

TRESPASS. The opinion states the point. The plaintiff had judgment below.

A. S. Treat and *H. S. Sanford,* for appellant.

D. B. Lockwood, for appellee.

PARK, C. J. In this action, which is one of trespass to real estate, the court charged the jury upon the question of damages as follows: "If the jury find, that with a knowledge of the impropriety of forcibly dispossessing the plaintiff, the defendant wholly disregarding the plaintiff's rights, proceeded to forcibly remove his goods, they might not only consider the actual damage to the plaintiff's property, but also the expense incurred in seeking at law a redress of his injury."

* See *ante*, 186.

[Omitting this discussion.]

We might stop here in our consideration of the case, but inasmuch as there must be a new trial, unless the plaintiff remits the taxable costs and the sum allowed as indemnity, we briefly consider a question raised upon the merits of the case; and that is, whether our law will justify the act of the defendant under the circumstances.

The defendant bases his claim in the case upon the distinction between a forcible retaking possession of premises where a party is resisted, and resistance is overcome by superior force, and a quiet, peaceable re-entry. But we fail to see a substantial distinction in the two cases, for unless a party has the right to retain possession by force and strong hand when he has once acquired it peaceably in the temporary absence of another party, the right would be valueless. It could hardly be called a right, if he must leave as peaceably as he entered, upon the return and demand of the other party. And if he has the right to retain possession by force, what becomes of the distinction? In contemplation of law the other party is in possession still, and has an equal right, to say the least, to retain that possession. A conflict would immediately ensue, in which the superior force would prevail; and what matters it whether that conflict arises in the first instance, or after one of the contestants has got into the premises by stealth, in the temporary absence of the other? A distinction based upon such ground can hardly exist. Our statute of forcible entry and detainer is against the right of a landlord to regain the possession of premises by force and strong hand, when his tenant is holding over his term. Our statute of summary process, giving a landlord a speedy remedy in such cases to regain the possession is against it. And the case of *Larkin* v. *Avery*, 23 Conn. 304, is against it. The reporter's summary of the case, applicable to this question, is as follows: "Where the relation of landlord and tenant exists, possession of the leased premises cannot be obtained by force against the will of the tenant, but the landlord must resort to his legal remedy for that purpose."

There is error in the judgment appealed from, and it is reversed, and a new trial ordered, unless the plaintiff remits so much of the judgment as equals the taxable costs and the sum allowed as indemnity.

Judgment reversed.

The other judges concurred.

MEAD v. HUSTED.

(52 Conn. 53.)

Trial — burden of proof — presumptions.

In civil actions the mere preponderance of evidence should prevail, although it involves the guilt of a felony.*

In an action for the burning of the plaintiff's barns the judge instructed the jury, that "if upon the whole testimony, after giving the defendant the benefit of the presumption in his favor, they fairly and honestly believed that it was more likely to be true that the defendant set fire to the plaintiff's barns than that he did not, they ought to render a verdict for the plaintiff, and if they did not so believe, then for the defendant." *Held*, no error.

TRESPASS. The opinion states the case. Verdict for the plaintiff.

G. Stoddard, S. Tweedy, M. L. Mason and *F. A. Hubbard*, for appellant.

G. H. Watrous, H. S. Sanford and *H. W. R. Hoyt*, for appellee.

LOOMIS, J. The defendant's counsel having abandoned the other errors assigned, our discussion will be confined to two questions — one relating to the admission of evidence, and the other to the charge to the jury.

[Omitting the former.]

The defendant asked the court to charge the jury, "that in this case to create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumption as well as the opposing evidence. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon the defendant a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act or one in accordance with his known inclinations. To fasten upon the defendant the act of setting fire to the buildings of the plaintiff should certainly require more evidence than to establish the fact of payment of a note or of the truth of an account in set-off; because the improbability or presumption in one case is much stronger than in the other."

* See *Welch* v. *Jugenheimer* (56 Iowa, 11), 41 Am. Rep. 77. See also 48 Am. Rep. 675.

Upon this request the court charged the jury as follows: "This is a civil action, and is to be decided like any other civil action; and although the acts for which damages are sought might have been prosecuted as crimes, we are dealing with them here only in their civil aspects. In a criminal prosecution the law requires full certainty — that is, proof beyond a reasonable doubt, before a verdict of guilty can be given. In civil actions this degree of certainty is not required. In these cases the law requires juries to take into account, and sometimes to be governed by probabilities; and among these probabilities are such as to attach human action. There is an antecedent probability that a man will not commit a crime. In a lesser degree perhaps there is a probability that a man will not commit any heinous or repulsive act, or one which would subject him to heavy damages. Unfortunately however it is true that men do commit crimes, and they do commit acts which subject them to damages. But the probability that they will not do so is one to which the defendant is entitled; or as stated by counsel, the improbability that a man will do such acts as are charged against the defendant in this complaint and which expose him to heavy loss. This is a presumption to which the defendant is entitled, which you ought to consider, and which ought to be overcome in your minds before you render a verdict against him."

Complaint is made of this charge that it did not go far enough as to the nature and force of the presumption of innocence. If we compare the charge as given with the defendant's request, we find they are substantially alike, differing only in the fact that the charge alludes to the reasons upon which the presumption is founded, which the request omits. But it is said that the jury must have understood from the instructions given that the presumption was one which arose solely out of a man's fear of being subjected to damages, and consequently that its force would be limited by this fact. We do not however so construe the language of the court. The defendant in express terms had the benefit of such probabilities as attach to human action, and two grounds were alluded to by the court, both the antecedent probability that a man would not commit a crime, and also the other probability that a man would not commit any heinous or repulsive act which would subject him to heavy damages. The action in question involved both these grounds. It seems to us even more favorable for the defendant than the very language of the request would have been.

But in further answer to the objection we ought to say that the charge as given was in advance of the doctrine heretofore enunciated by this court. In other jurisdictions some very respectable authorities have gone in actions of this kind even beyond the rule adopted by the charge; but we think the charge is in accord with the greater number of American authorities. But hitherto in this State we have held to the rule that in civil issues the result should follow the mere preponderance of evidence, even though the result imputes the charge of felony. To this effect is the decision in *Munson* v. *Atwood*, 30 Conn. 102. It ought however to be regarded as still an open question in this State, whether as one factor in determining the preponderance of the evidence, the triers may consider the presumption in question. The present case does not require a decision upon this point. It is enough to say that this court will not go beyond the position taken by the court below.

The other part of the charge to which exception is taken is as follows: "If upon the whole testimony, and after giving the defendant the benefit of the presumption in his favor to which I have before alluded, you believe, fairly and honestly, that it is more likely to be true that the defendant did set fire to these barns of the plaintiff than that he did not, you ought to render a verdict for the plaintiff; and on the other hand, if you do not so believe, your verdict should be for the defendant."

Had the court in the same connection and under the same qualifications simply told the jury that a preponderance of the evidence in favor of the plaintiff would justify a verdict in his favor, instead of using the language, "if you fairly and honestly believe that it is more likely to be true," etc., no fault could be found with it. It would have been the language usually employed, which is always safer for the court than to substitute other words not so common. Nevertheless if the substituted phrase would be understood in the same way by the jury, or if it is in fact fairly equivalent in meaning, a new trial should not be granted on that account. In the connection and in view of the instructions as to the burden of proof and the duty of the jury to examine the whole evidence and give the defendant the benefit of the presumption in his favor, we think it must have had the same effect on the jury as the ordinary language would.

But it is claimed that the law cannot sanction the use of the substituted phrase or regard it as equivalent. The judge, instead

of requesting the jury to weigh the evidence and determine the result by the preponderance, asked them to consider it all, and then gave them the true and only weighing scales whereby preponderance could be determined, namely, the effect on the honest mind of each juror. If the effect was to convince the jury that the controlling facts for the plaintiff were more likely to be true, they ought to give a verdict for him, otherwise for the defendant.

We think the test furnished was the true and only means by which the jury could ascertain whether there was any preponderance. The logical process in all juridical reasoning is only imperfect induction or analogy, and there is no case depending on moral evidence where we can reach a result which excludes all possibility of the contrary being true. In Wharton on Evidence, section 8, it is said that "juridical evidence is evidence of mutable phenomena through human agency addressed to a human tribunal; and both as to the witnesses and the things to which they testify, credit is given only on probable grounds."

These principles apply to criminal as well as to civil causes; the distinction being as to the degree of probability. The former require a very high degree, amounting, as we sometimes say, to an abiding conviction of the truth, while the latter may be determined upon the evidence by the mere balance of probability. Suppose at a certain stage of a trial, after evidence on both sides has been introduced, the jury are unable to tell which side is more likely to be true, is it not a case of exact equipoise? If nothing further is introduced, the plaintiff of course must fail; but if on application to the court he is permitted to introduce some further evidence, which has the effect to make the jury fairly and honestly believe the issue for the plaintiff is more likely to be true, is it not now a case where the evidence for the plaintiff preponderates? It must be so.

But the defendant appeals to the authorities, and cites two cases that sustain his objections to the charge: *Haskins* v. *Haskins*, 9 Gray, 390, and *Parker* v. *Johnson*, 25 Ga. 576. The cases, it must be conceded, are in point, and from the high character and ability of the courts rendering the decisions, we hesitated at first whether we ought not to follow them.

In the former case a new trial was granted because the court below used the phrase "balance of probabilities," as equivalent to preponderance of proof. BIGELOW, J., in giving the opinion of the court, said: "'Balance of probabilities' is at best a vague and in-

definite phrase, which would rather lead the jury to infer that they might form their verdict on a guess at the truth, gathered from the evidence, than on a real solid conviction of it, founded on a careful scrutiny and examination of the proof." In the latter case the court held that a charge to the jury that "whichever they believed the weight of probability to be they were authorized to find," was calculated to mislead the jury, and was incorrect as matter of law, because the evidence "should so preponderate in favor of the party for whom the verdict is rendered as to satisfy the jury that he is entitled to it."

The first mentioned case is placed upon the ground that the substituted phrase was not the equivalent of "preponderance of evidence," and that it was vague and indefinite and calculated to mislead the jury. The case from Georgia would seem really to concede that "weight of probability" may be equivalent to "preponderance of evidence," but the chief objection is that in all cases the evidence must so preponderate as to satisfy the jury — that is, a certain degree of preponderance is necessary even in civil cases. It will be noticed that this last objection lies with equal force against the use of the common expression that the jury should find for the plaintiff, if they find the preponderance of evidence in his favor. In both cases qualifying instructions would have to be given as to the degree of probability in one case, or the degree of preponderance in the other; and yet in the latter case was there ever a new trial given for want of the qualification? We submit that in civil causes it is utterly impracticable to require of the court any instructions to the jury as to the amount or degree of preponderance, and the law knows no degree in such case. The preponderance of course must be so manifest that the jury will be satisfied to found their verdict upon it. This will always be understood without special instructions. Following out the suggestions of the Georgia case, the defendant's counsel say that the charge in the case at bar would allow the jury to find for the plaintiff though he had failed to make even a *prima facie* case. There is just the same and no greater danger of this than there would be under the ordinary instructions to find according to the preponderance of the evidence. How could the jury find a thing most likely to be true, which the evidence would not sustain even if there was no opposing proof. The rule as to the burden of proof involves the necessity of making a *prima facie* case.

The other objection, as to the danger of misleading the jury, so strongly stated by the Massachusetts court, does not strike us as well founded, especially under the circumstances of this case, for the remarks of the judge in connection with the words objected to operated, we think, to guard the jury against any mere speculation on probabilities independent of the evidence, for it was stated in substance that they must allow all the evidence to have its effect, including the presumption of innocence, and that their final con viction or belief must be a fair and honest one. And we think the test furnished to the jury by the phrase, "most likely to be true," may have operated in this case even more to the advantage of the defendant that the usual language as to preponderance of proof, inasmuch as they were required to commence their investigation with the opposing presumption that what the plaintiff claimed was not likely to be true.

We have confined our attention so far to the reasons given for the decisions in Massachusetts and Georgia. The cases rest entirely on the reasons given; no authorities are cited in their support. We are able to cite in favor of the positions taken in the present case the opinions of some law writers and jurists of at least equal distinction and ability.

In 1 Best on Evidence (1st Am. from the 6th Lond. ed.), § 95, it is said: "But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision." It seems to us not a little singular that the phrase used in this masterly treatise of Mr. Best should be almost verbally identical, and entirely so in meaning, with that used in the two cases cited, and yet be so strongly condemned, especially by the Massachusetts court, as most vague, indefinite and misleading, without however referring at all to the fact that it had ever been used by so distinguished an author.

The proposition of Mr. Best, though different in words from the one we are considering, is, we submit, identical in meaning and effect, and therefore it furnishes a strong support for the position we have taken.

In *Cooper* v. *Slade*, 6 H. L. Cas. 772, Justice WILLES says: "I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an

authority referred to in Mr. Best's very able and instructive treatise on the Principles of Evidence." So long since as the 14th of Elizabeth, Chief Justice DYER and a majority of the other justices of the Common Pleas, in *Newis* v. *Lark*, Plowd. 412, laid down this distinction between pleading and evidence, "that in a writ or declaration or other pleading certainty ought to be shown, for there the party must answer to it and the court must adjudge upon it, and that which the party shall be compelled to answer to, and which is the foundation whereupon the court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable."

There is no error in the judgment complained of.

GRANGER, J., dissented.

CRANDALL v. LINCOLN.

(52 Conn. 73.)

Corporation — capital impaired — buying in its own stock.

A corporation whose capital was impaired bought in its own stock through an agent. The seller did not know who the purchaser was. *Held*, that the seller was liable to a creditor of the corporation.

CREDITOR'S bill against former stockholders of a corporation. The opinion states the case.

J. Halsey and *J. M. Hall*, for plaintiffs.

A. P. Hyde, *W. Hamersley*, *S. Lucas*, *C. H. Briscoe*, *J. P. Andrews*, *T. M. Maltbie*, *E. B. Sumner* and *H. Clark*, for defendants.

CARPENTER, J. The Willimantic Trust Company, a corporation by special charter, being insolvent, went into the hands of receivers

in April, 1878. The assets of the company are not sufficient to pay its liabilities, the deficit being about $35,000. Prior to its failure the affairs of the company were managed by a board of fifteen trustees. The by-laws required the trustees to appoint from their number an executive committee of five. The duties of the executive committee, so far as material, are found in the fifth section of the by-laws, as follows: "The executive committee shall superintend and direct with reference to all the business transactions of the company, especially as to the investment and disposal of its funds in stocks, bonds, mortgages and other securities, and all guardianships, receiverships and other special trusts, none of which shall in any case be accepted without their approbation, except such as shall be made by an order of a court of competent jurisdiction."

On the first of January, 1875, there was no surplus. On the first day of May following its stock was impaired, its actual value being then about seventy-five per cent of its par value. The officers and managers of the institution expected to realize enough from its assets to make the stock worth par, and believed that it was worth par. Some little time before the 14th day of June, 1875, as the company had in uninvested cash about $10,000, the scheme of purchasing the shares of the company by the corporation was talked over by the officers of the company. Nothing was determined upon in relation thereto, although the idea was favorably received, until the meeting of the executive committee on the 14th day of June, 1875, at which time the matter was fully talked over by the officers and the whole executive committee, and it was then determined to purchase stock of the corporation, and the president and secretary were instructed to proceed to purchase the same to the amount of $10,000. There was no vote or resolution of the executive committee to that effect, and no record thereof was kept. The purchases of stock made from time to time were reported to the trustees, and to the stockholders at their annual meeting in the spring of each year, and the executive committee and board of trustees were kept advised from time to time as the purchases were made. More than the $10,000 was so spent, and it is found that there was a general understanding existing at all times on the part of the executive committee that such purchases were being made, and the president and secretary always supposed that they had full authority to make such purchases, and when these transactions were reported to the executive committee, the board of trustees and the stockholders,

such action on the part of the president and secretary was approved. In that way three hundred and twenty-six shares of the stock of the trust company were sold and transferred to the company, for which was paid out to stockholders more than $30,000 of its funds. To enable the receivers to pay the debts, they have brought this suit to recover of these stockholders the amount so received by them.

The first question presented for our consideration is, whether the purchase of stock by the corporation in the manner stated, and under the circumstances, was legal.

The stock of a corporation is its only basis of credit. Unlike a partnership, its members generally are not individually liable for its debts. The character, reputation and credit of its promoters do not attach to the corporation itself except to a limited extent. Hence it is of vital importance that the law should rigidly guard and protect the capital stock. Otherwise, especially in these days when so large a portion of the business of the country is carried on by corporations, confidence, on which the prosperity of the country largely depends, would be seriously impaired. Hence it is that in equity the capital stock of a corporation is now regarded as a trust fund for the payment of debts. The creditors have a lien upon it, which is prior in point of right to any claim which the stockholders as such can have upon it; and courts will be astute to detect and defeat any scheme or devise which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors. A leading case on this subject is *Wood* v. *Dummer*, 3 Mason, 308. STORY, J., says: "It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated to such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of payment. During the existence of the corporation, it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why otherwise is any capital stock required by our charters? If the stock may, the next day after it

is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as of common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claim upon it; and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund until all the other claims upon it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands upon it are paid."

These principles apply as well to this corporation as to ordinary banks issuing bills for circulation as money.

In *Nathan* v. *Whitlock*, 9 Paige, 152, Chancellor WALWORTH held (we quote from the marginal note) that a "solvent stockholder who has given a stock note to a corporation for the purchase-money of his stock cannot, upon the insolvency of the company, or in contemplation of that event, even with the consent of the directors, transfer his stock to an irresponsible person, and be discharged from his liability upon substituting the note of such person for his own; such an arrangement having the effect of a withdrawal of so much of the capital of the corporation, and being a violation of the statute to prevent fraudulent bankruptcies of incorporated companies."

In *Adler* v. *Milwaukee Patent Brick Manf. Co.*, 13 Wis. 57, the court say: "The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund, pledged for the payment of the debts of the corporation. Until they are paid the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are extinguished."

In *Upton* v. *Tribilcock*, 91 U. S. 45, the court say: "The capital stock of a moneyed corporation is a fund for the payment of its

debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. * * * Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away."

The same court in *Sawyer* v. *Upton*, 91 U. S. 56, say: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it, as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice." See also *Webster* v. *Upton*, 91 U. S. 65. Many more cases might be cited to the same effect, but it is unnecessary.

These principles, which are applicable to corporations generally, are especially applicable to this by the express provisions of its charter. It had the powers of a savings bank, of a safe deposit company, and also the power to accept and execute all trusts, whether fiduciary or otherwise, committed to it by private parties, or by any court or tribunal or any other legally constituted authority in the State; and any court having jurisdiction to appoint guardians for infants or receivers of estates was authorized to appoint this corporation such receiver or guardian; and when so appointed no bonds were required, but such appointment might be made upon the security provided for in the charter, that "all the capital stock, property and estate of every kind belonging to said company shall be and shall stand charged with the fulfillment of said trusts, and the payment of said deposits and said trust and other funds, as the first and prior liens thereon in case of the failure of said corporation." Charter, § 5, Special Laws, vol. 7, p. 150.

The next section declares that the capital stock shall not be less

than one thousand shares of $100 each, and carefully provides that the corporation shall not commence business "until all the capital stock is subscribed for and taken, and at least $30,000 is paid in, and the balance, if any, paid or secured to be paid, either by a first mortgage or mortgages of real estate of the value of double the amount to be secured, or by the pledge of the bonds of the United States, or of the several States, or of either of the incorporated cities, towns or boroughs of this State, of at least twenty per cent more in value than the capital so secured."

The same year this institution was chartered the legislature placed this and other similar institutions under the supervision of the bank commissioners, and required their several presidents to make returns annually to the bank commissioners, giving a detailed statement, showing the amount invested in real estate, its location and value; the amount invested in stocks or bonds, specifying the number of shares, the par value, the cost, and the market value at the time of making return; also the number and description of bonds, their par value, cost and present market value; and all other investments in personal property, specifying the actual cash value and cost thereof; also the amount held in trust and on deposit, etc. Session Laws of 1871, p. 597.

Besides this, the company was forbidden by law to declare any dividend except from net earnings after deducting all losses, overdrafts and obligations suspended or overdue, and from making any loan or discount on a pledge of its own stock. Gen. Stat. 283, § 3.

It would seem as though no argument ought to be required to show that capital stock so carefully guarded, both by legal principles and positive statute law, cannot be divided among stockholders to the prejudice of creditors.

Arguments however are not wanting. The stock must be paid for, or secured, not for the benefit of the stockholders, but for the security of those dealing with the corporation. This provision was imperative; the directors were not at liberty to dispense with it. But if they were at liberty when paid, or at any time afterward, to pay it back to the stockholders, they had the power to nullify the charter and defeat the intention of the legislature.

The statute fixing the minimum number of shares and their par value determined as far as practicable the minimum value of the capital stock, and it was clearly the intention of the legislature that it should be no less. The number of shares therefore could not be

reduced, and the value of all the shares diminished, except by legislative authority. If the trustees could purchase stock with the capital of the corporation, they could of their own authority reduce the number of shares and correspondingly diminish the aggregate value of all the shares. Again, if they may purchase any of the stock, they may purchase all of it, and thus divide all the stock among the stockholders. What then becomes of the security designed for infants, estates and creditors ?

The statute forbidding the company to make dividends payable from the stock and to loan money upon a pledge of its stock, by necessary implication forbids the company from purchasing its stock. The provision that the company may have a lien upon the stock as security for any debt due from the owner is not in conflict with this view of the statute. Such lien does not contemplate that the company may become the owner of the stock. It contemplates rather that the lien shall be enforced, like any other lien, by a sale of the stock, the purchaser being substituted for the delinquent stockholder.

Where it is provided by law that each stockholder in case of insolvency shall be liable to contribute a sum equal to the nominal value of his stock, there is an obvious reason why the company cannot become a stockholder. If it may, it withdraws from the fund designed to secure creditors a sum equal to the nominal value of the stock so owned. But in this case and in other cases where stockholders are not liable to contribution, the only security which creditors have being the capital stock, it is very important that the law should guard that security with the greatest care and vigilance, and not allow trust funds belonging to creditors to be appropriated by stockholders who have no equitable right to them.

These views are abundantly sustained by the authorities from which we have quoted and from many more which might be cited. We do not intend to say that under no circumstances can a corporation legally become the owner of its own stock. Should it loan money to a stockholder and be obliged to take its own stock in payment, that would not be illegal *per se*. So too it may be allowable for a company to purchase stock temporarily with its surplus earnings; but stock should not be held indefinitely; it should be disposed of in a reasonable time. If not, and should creditors thereby be prejudiced, perhaps the managers of the company might be liable.

Nor do we intend to say that a direct purchase would be de-

clared illegal at the instance of a party to the transaction. If the stock is reissued and creditors are not prejudiced probably the courts would not interfere. But as a rule to which there are few if any exceptions, when a stockholder conveys his stock to the company and receives in return a portion of the capital, he holds the money so received subject to the superior equities of creditors.

Our conclusion is that the capital stock of the company being impaired when the stock in this case was purchased, and the stock in each case having been paid for from the capital, the transactions were illegal and cannot be sustained.

[Omitting other considerations.]

We advise the Superior Court to render judgment against all the present defendants except Whiting Hayden.

The other judges concurred. Judges BEARDSLEY and STODDARD of the Superior Court sat in the places of Judges PARK and PARDEE, disqualified by interest.

WELCH v. BARBER.

(52 Conn. 147.)

Contempt — right to hearing.

The false pretense by a defendant in a civil action that he is too ill to attend the trial, and the procurement of an adjournment thereby, is a contempt, but is not summarily punishable on affidavits in the absence of the defendant.*

CONTEMPT proceedings. The opinion states the case.

G. A. Hickox and *D. C. Kilbourn,* for appellant.

A. H. Fenn, for appellee.

CARPENTER, J. In a civil suit pending before the Court of Common Pleas the defendant caused his counsel to procure a postponement of the trial on the ground that he was ill and unable to attend court. The plaintiff suspecting that there was no ground for a postponement, filed a written application, accompanied with affidavits, praying for an attachment for contempt. An order to show

* See *In re Oldham* (89 N. C. 23), 45 Am. Rep. 678.

cause was served on the defendant. He did not appear in person on account of sickness, but his counsel appeared for him and filed successively a plea in abatement and demurrer, both of which were overruled. They then filed an answer, to which the plaintiff made no reply. A hearing was then had in the absence of the defendant. To prove the facts alleged in the application the plaintiff offered an affidavit signed by three persons, being the same affidavit which is attached to the application. The defendant objected to its admission, but the court admitted it. Two of the affiants subsequently appeared in court and testified in person. The plaintiff also offered a deposition, to the admission of which the defendant's counsel objected, but the court admitted it.

The court found the allegations of the application true, and sentenced the defendant to pay a fine of fifty dollars and costs. The costs were taxed as in an ordinary civil suit, including complaint, service, court fees, trial fees, etc., against the defendant's objection.

Before proceeding to discuss the questions more particularly raised by the appeal, we will briefly notice the claim that the facts do not constitute a contempt, and consider the nature and character of a contempt generally.

"Contempt is a disobedience to the rules and orders of a court which hath power to punish such offense." "And this word is used for a kind of misdemeanor, by doing what one is forbidden, or not doing what he is commanded." Jacob's Law Dictionary, *in verbum*. "Some of these contempts may arise in the face of the court, as by rude and contumelious behavior; by obstinacy, perverseness or prevarication; by breach of the peace, or any willful disturbance whatever. Others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or process of the court, by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of their authority (so necessary for the good order of the kingdom) is entirely lost among the people." 4 Bl. Com. 285.

The most remarkable instances of contempts, for which any person whatsoever is punishable, are reduced to the following heads in

2 Hawkins' Pleas of the Crown, 220: 1. Contempts of the king's writ. 2. Contempts in the face of the court. 3. Contemptuous words or writing concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the court. 6. Forgeries of writs, and other deceits of the like kind, tending to impose on the court. In 2 Swift's Digest, 380, the definition is substantially the same as in Blackstone.

From these definitions it is apparent that the conduct of the defendant may have been of such a character as tended to obstruct and embarrass the court in the administration of justice. The court below found that it was a contempt, and the facts being of such a nature that it does not clearly appear as matter of law that they did not and could not constitute a contempt, we are not at liberty to revise the finding on that point.

The statute limits the penalty for contempts in the presence of the court. Other contempts may exist, such as disobeying injunctions and other orders of the court, which the statute does not provide for, but the manner of dealing with them is to be determined by the common law. There are other acts which are in defiance of the power and dignity of the court, but which are not actually nor constructively in its presence. Of this class is the case of *Huntington* v. *McMahon*, 48 Conn. 174. These too are not within the statute, but are defined and punished by the common law.

The present case belongs to the latter class. The offender was not personally present in court and the judge could have no knowledge of the facts which constituted the offense except as they were communicated to him by others. He could not of his own motion and upon facts within his own knowledge render judgment against the delinquent. As the facts must be established by proof a trial was necessary.

Another question which becomes important is, whether the contempt is civil or criminal. A civil contempt is one in which the conduct constituting the contempt is directed against some civil right of the opposing party, as where an injunction is disregarded or some act required by the court for the benefit of the other party should be neglected. In cases of contempts of this sort the proceeding for its punishment is at the instance of the party interested and is civil in its character. Such are the cases of *Lyon* v. *Lyon*, 21 Conn. 185, and *Rogers Manufacturing Company* v. *Rogers*, 38 Conn. 121. A criminal contempt is conduct that is directed

against the dignity and authority of the court, and a proceeding for its punishment should conform as nearly as possible to proceedings in criminal cases. When the court has knowledge of the contempt as it occurs it will of its own motion proceed to punish it; but when witnesses are required to prove it, the proper course is for some informing officer to bring it to the attention of the court. *Middlebrook* v. *State*, 43 Conn. 257; *Huntington* v. *McMahon*, 48 Conn. 174.

The process in this case was begun and carried on to the end as a civil case in the name of the plaintiff in the suit pending. That was irregular. But the irregularity might be overlooked and the matter treated as a proceeding by the court of its own motion upon the suggestion of the plaintiff, were it not for the fact that the defendant on the trial was denied some rights and deprived of some privileges to which a party in a criminal proceeding is clearly entitled.

In the first place, it is very clear that the court had no power to proceed to a trial and judgment of condemnation in the absence of the accused. "If such offense be done by a person not present in court, and proper complaint or information be made, the court will either make a rule on the party to attend on a certain day to answer to the matter complained of, or else will make a rule upon him to show cause why an attachment should not be granted against him; or if the offense be of a very flagrant nature, will grant an attachment upon the first complaint; and the party who is ordered to attend, in pursuance of such rule, must appear in person, and not by attorney." 2 Swift's Digest, 382.

In the next place, the accused was entitled to be heard. In cases of this character, where the act was equivocal, and might or might not be a contempt, and it was necessary to examine witnesses in order to determine that question, the party must be present and has a right to be heard. If it had been made to appear that the matters which the defendant's counsel set up in his behalf in the answer were true, we do not see why he would not have been entitled to a discharge. Those facts were in substance that he was in fact sick, that he was unable to attend court, that there were no false representations, and that he intended no disrespect to the court. It is apparent from the record that the accused had no opportunity to show these facts — an opportunity which the law clearly gives him. 2 Swift's Digest, 382.

The court also erred in admitting the affidavit in evidence on the trial. The affidavit had performed its office when it satisfied the court that this was a case which it ought to notice. It could not be received in evidence to prove guilt without violating two cardinal principles in all criminal trials — the right of the accused to confront the witnesses against him in open court, and his right to cross-examine them. The error was not healed by the subsequent appearance of two of the affiants as witnesses. The deposition was also improperly received, and for obvious reasons.

For these reasons the judgment of the Court of Common Pleas was erroneous, and must be reversed.

The record shows that the defendant sustained damage by such erroneous judgment to the amount of $110.31; for which sum, with costs, the defendant is entitled to judgment.

Judgment reversed.

The other judges concurred.

Town of Burlington v. Schwarzman.

(52 Conn. 181.)

Injunction — obstruction to highway.

Where one unlawfully puts a fence across a town highway and threatens to maintain it, he may be prohibited by injunction at the suit of the town. (*See note, p.* 574.)

SUIT. Injunction. The opinion states the case. The injunction was granted below.

W. W. Perry, for appellant.

E. Johnson and *S. O. Prentice*, for appellees.

Loomis, J. There is an appeal from a judgment of the Court of Common Pleas restraining the defendant, by injunction, from fencing in and obstructing a public highway.

The first ground of appeal is, that the town is not the proper party plaintiff. It is contended that highways are mere public easements which belong to the general rather than the local public, and therefore that the town, as such, has no interest sufficient to main-

tain the suit. The defendant fortifies this position by the following citation from High on Injunctions, § 756: "The simplest and most generally accepted test in determining whether one is a proper party complainant to a bill for an injunction is, whether he possesses a legal or equitable interest in the subject-matter of the controversy." This would seem to be in point, but it would have more weight as applicable to the case at bar, were it not that the section immediately preceding in the same treatise says: "The corporate authorities of a town are proper parties to enjoin a public nuisance. Thus the erection of buildings upon a public square which has been dedicated as such to the use of the inhabitants of a town, constitutes a public nuisance which may be enjoined by the corporate authorities." It is obvious that the test mentioned was never intended for universal application. It needs at least, this qualification, that where the threatened act is one involving corporate responsibility, the town so responsible may resort to this preventive remedy by injunction, upon the same principle as if the legal or equitable title to the subject-matter was in the town; or perhaps, the rule given by the learned author needs no other qualification than such a liberal construction of the terms "legal or equitable interest" as would include corporate responsibility.

But the defendant also applies to the case another test, which he argues, is fatal to the plaintiff's right to bring the suit. This is found in section 783 of Wood on Nuisances. It is there stated that "unless the party injuriously affected could maintain an action at law, he cannot maintain a bill for an injunction." This cannot be necessarily the case, for the jurisdiction of a court of equity is far more extensive than that of a court of law. It is the very fact that a court of law cannot afford ample redress for all injuries, or even any redress for some, that called courts of equity into existence; hence, when a right is violated, even though it is a merely equitable right, which a court of law could not redress, equity will interfere.

Our conclusion is that the liability of the town to pay damages in case a person is injured by the obstruction is a sufficient interest to enable it to appear as plaintiff in a complaint in equity to prevent the threatened obstruction, and if this position needs further confirmation it may be found in the cases of *City of New Haven* v. *Sargent*, 38 Conn. 50; *Derby* v. *Alling*, 40 Conn. 410; *Trustees of Watertown* v. *Cowen*, 4 Paige, 510, and *Mayor, etc., of London* v. *Bolt*, 5 Ves. 129.

The defendant's next claim is, that if the plaintiff is the proper party no case is shown for equitable relief. The facts upon which the claim is based are the temporary character of the obstruction, the fact that it might have been removed easily, even by a traveller, and that a public prosecution might have been instituted or a civil action brought by one injured against the defendant.

The defendant cites in support of the proposition *Bunnell's Appeal*, 69 Penn. St. 62. It is said in the opinion "that where a mere wall of stone and timber was built across the road — a mere barricade temporary in character and easily and inexpensively removed, a remedy by injunction should be refused." This isolated passage comes fully up to the claim made in this case, but the actual decision falls far short of it; which was, not that an injunction should be permanently refused, but only temporarily, till after a trial at law, for the opinion proceeds immediately to say — "This is not the ordinary case, which was evidently in the mind of the learned judge" (referring to the court below that had granted the injunction) "of an old and long known road. * * * But here the facts that the road was never opened throughout its entire length * * * that the surveys lately made had no reliable beginning or ending point, and that the route has been disputed many years, are all reasons to lead a chancellor to doubt, and to send the case to a jury, while the obstruction complained of is but an unimportant barricade made to contest the right, and not a permanent or valuable erection or likely to produce irreparable injury." All these elements of doubt rendered it very proper to send the case to a jury for trial before determining the question as to an injunction.

It is quite possible that the Pennsylvania courts would go to the length indicated in the passage from the opinion relied upon by the defendant, for it must be conceded that there is considerable contrariety of decision in regard to the nature of the threatened act or exigency which will constitute such an irreparable injury as to justify the remedy by injunction. But as this branch of equity has been administered in this State, we cannot doubt that the facts of the case at bar lay an adequate foundation for an injunction.

Were the way merely a private one, thus wrongfully obstructed and threatened, we think our courts would not hesitate to enforce the remedy upon the ground of preventing a recurring grievance and a multiplicity of suits. But its being a public way and the act

a public nuisance makes the case in our judgment vastly stronger; many people are exposed to great annoyance and injury and may have occasion to bring many suits. Moreover the act complained of is one that denies the existence and defeats all the purposes of a public highway. Consequently the injury to the highway as such may well be termed irreparable. All remedies other than by injunction would be tardy, uncertain and imperfect; that would be speedy, complete and every way effective. As to the remedy by injunction, we like the reasoning of BREESE, C. J., in giving the opinion of the court in *Craig* v. *People*, 47 Ill. 496; although it refers to a more important highway than the one now in question, yet the underlying principle as to the nature of the remedy would be the same in both cases. The judge says: "It is true an action at law would lie against these appellants, should they obstruct the road. * * * But this remedy * * * would not only be tardy but wholly inadequate. Intercourse between settled portions of the county and the county seat would be almost wholly interrupted, the citizens put to great inconvenience and injuries inflicted, which though in particular cases might be trifling, yet in the aggregate would be too grievous to be borne. It would be a monstrous public nuisance, to prevent which full power is lodged in a Court of Chancery by calling into exercise its restraining power. With that powerful arm the whole wrong can be at once grasped and the injury prevented."

[Omitting a minor point.]

There was no error in the judgment complained of.

The other judges concurred.

NOTE BY THE REPORTER. — See *Marsan* v. *French*, 61 Tex. 173; s. c., 48 Am. Rep. 272; *Hall* v. *Rood*, 40 Mich. 46; s. c., 29 Am. Rep. 528.

Obstructions to a highway will be prohibited by injunction on behalf of citizens having an immediate and special interest in the matter. Thus in *Craig* v. *People*, 47 Ill. 487, it was held, that where an injury of a public nature is threatened, as the inclosure of a highway, whereby public travel is in danger of being interrupted, and great numbers of citizens subject to petty loss and annoyance, an injunction may issue. The bill was filed by the State's attorney, verified by the county judge.

Injunction lies at the suit of a private person to restrain such an appropriation of the site of a street by another person as leaves no way of access to plaintiff's premises, and otherwise prejudices him. *Pratt* v. *Lewis*, 39 Mich. 7. The court said: "The transaction is not one where nothing is involved beyond a mere impediment or obstacle to the legitimate enjoyment of a public road,

and where no one suffers a greater direct inconvenience than another. Far from it. What is attempted is the complete appropriation of the site of the way by defendants to their own private use in perpetuity, and the entire exclusion of complainants from all enjoyment, and from all chance of egress and ingress on that side, except upon the condition of transferring the burden of the easement to their own premises. And this is not all; other kinds of detriment are involved. The change of situation of complainant's improvements and sites for improvements relatively to street accommodations and surrounding conditions must cause special disturbance of complainant's rights. Distance, room, aspect and eligibility are matters of much consideration in connection with actual neighboring environments. This feature of the case is plain. *Conrad* v. *Smith*, 32 Mich. 429; *Benjamin* v. *Storr*, 9 L. R. C. P. 400; 10 Eng. 231; *Spencer* v. *London & Birmingham Ry. Co.*, 8 Sim. 193; *Corning* v. *Lowerre*, 6 Johns. Ch. 439; *Frink* v. *Lawrence*, 20 Conn. 117; *Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281; *Soltau* v. *De Held*, 9 E. L. & E. 104; 2 Sim. (N. S.), 133."

In *Conrad* v. *Smith*, 32 Mich. 429, the defendants were enjoined from proceeding as highway commissioners to cut a ditch along the road-side in front of complainant's farm and dwelling, some forty-six rods long, from two to five feet deep, and of an average width of six feet at the top and of two feet at the bottom, the proofs not showing any necessity for it, and showing that it will work irreparable injury to complainant. COOLEY, J., dissenting. The court said: "They were proceeding improperly and illegally and by rapid steps, under a claim of official power, to do an act to his permanent injury. They proposed an unlawful invasion of his land within the road limits, to commit a series of trespasses in the making and keeping up an artificial water-course there in order to drain the surrounding country. This water-course was to pass along the complainant's front, and between his place and the travelled part of the road, and there is reason to think that besides other injuries, the construction of a water-course from the west to the east swale, unless the outlet of the latter were greatly enlarged, and which is a work the defendants would hardly have power to execute, would in wet seasons, and at all times in case of heavy rain falls, considerably swell the waters in the east swale, and induce a set-back upon his land to a much greater extent than has happened heretofore, and in that way cause him injury. On the whole, the reason is strong for thinking that the work projected, if suffered to be carried out, would in its consequences do the complainant irreparable injury."

So the building of a house on a highway may be restrained at the suit of adjacent lot owners suffering special injury. *Corning* v. *Lowerre*, 6 Johns. Ch. 439. See also *Pettibone* v. *Hamilton*, 40 Wis. 402.

But it is essential that the plaintiff show special injury to him, and his being merely a resident and tax payer, or being inconvenienced in travelling, is not enough. *Shed* v. *Hawthorne*, 8 Neb. 179. The court then said: "It is an ancient rule of law, that no action lies for a public nuisance but by indictment only, because the damage being common to the public, no one can assign his particular portion of it, and the only exception to this rule is where the private person suffers some extraordinary damage distinct from that suffered by the

public at large." Citing *Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 577; *O'Brien* v. *Norwich, etc., R. Co.*, 17 Conn. 375; *Moses* v. *Pittsburg, etc., R. Co.*, 21 Ill. 522. "A bill in equity will not be entertained for an injunction to remove or abate a public nuisance, or to enjoin an obstruction which constitutes such nuisance, unless it be clearly shown that the plaintiff does and will sustain a special damage distinct from that done to the public at large." The same doctrine is held in *Harvard College* v. *Stearns*, 15 Gray, 1; and in the precise case of a highway, in *McCowen* v. *Whitesides*, 31 Ind. 285.

Where the fee of the street is in the city, and a railroad is licensed by the city to lay a side track in such street, in front of the company's property, to connect with its main track, private individuals owning land in the vicinity, but not abutting on that part of the street, may not restrain the construction. *Truesdale* v. *Peoria Grape Sugar Co.*, 101 Ill. 561. Three judges dissenting. The court said: "No direct injury would be done to complainants' land, and at the utmost only consequential damages would be sustained. The nature and extent of such damages could only be ascertained after the completion of the work. It may be, if the ordinance granting the license shall be observed in the construction of the side track, no serious detriment will result to complainants or others from its construction. But be that as it may, the track is to be constructed on lands not owned by complainants, and under a license from the only party having lawful authority to grant the privilege, and any expected damages that may be sustained by reason of the proposed work, can only be recovered in an action at law. Equity will not entertain jurisdiction to enjoin the proposed work. The rule of law on this subject is so well settled by previous decisions of this court, it is not deemed necessary to discuss it again as a new question. The following cases contain a full expression of the views of the court the questions discussed by counsel in this case: *Stetson* v. *Chicago, etc., R. Co.*, 75 Ill. 74; *Patterson* v. *Chicago, etc., R. Co.*, 75 Ill. 588; *Peoria, etc. Ry. Co.* v. *Schertz*, 84 Ill. 135; *Cairo, etc., R. Co.* v. *People*, 92 Ill. 170."

But even where the injury is special, it must also be irreparable and not capable of compensation in damages. Thus a mere trespass upon a public road, although continuing, as by building upon it and thus narrowing the passageway, may not be restrained by injunction. *Fort* v. *Groves*, 29 Md. 188. Increase of risk of fire is said to constitute a valid ground of injunction. *Pettibone* v. *Hamilton*, 40 Wis. 402. So injury to the value of a toll-bridge. *Keystone Bridge Co.* v. *Summers*, 13 W. Va. 476. In the latter case the court said: "A court of equity ought not to interfere by injunction to prevent a public nuisance, when the party asking its aid shows no private injury actually sustained or justly apprehended by him. *Beveridge* v. *Lacey*, 3 Rand. 63. The obstruction to a public highway, to justify the interposition of a court of equity, must be more than a mere public nuisance, it must work a special injury to the plaintiff. *Coming* v. *Lowerre*, 6 Johns. Ch. 439; and such injury must not be trivial, and such as may be fully compensated in an action at law. *Fort* v. *Groves*, 29 Md. 188. But if the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity by an in-

junction ought to prevent such a nuisance. *Green* v. *Oakes*, 17 Ill. 249; *Mohawk Bridge Co.* v. *Utica & Schenectady R. Co.*, 6 Paige, 563; *Jerome* v. *Ross*, 7 Johns. Ch. 322; *Crenshaw* v. *State River Co.*, 6 Rand. 245. In this case the public highway is the approach to the plaintiff's toll-bridge from the eastern side; and its obstruction must necessarily injure most seriously the value of this bridge as a toll-bridge. The plaintiff by this public nuisance sustains a peculiar injury, which cannot be compensated adequately by a common-law suit. The obstruction, which he seeks to enjoin, is a perpetual closing of this public highway; which must operate a permanent injury to the plaintiff's toll-bridge, rendering it comparatively valueless. The case comes directly within the prevention, or I might say, preservation powers, of a court of equity."

In *Bunnell's Appeal*, 69 Penn. St. 59, a road was laid out in 1820 through Bunnell's land; in 1868 he erected a "stone row" across what was alleged to be the road. In a proceeding in equity to restrain him from maintaining the erection, etc., alleging it to be a public nuisance, and a special injury to the plaintiff, the evidence was conflicting as to whether the road had been opened by the supervisor, where it had been opened, and that the route of the road had been frequently changed, etc. *Held*, that the proceeding in equity could not be maintained: 1, Because of the uncertainty of the location of the road; 2, that there was a full remedy at law; 3, that the injury was not permanent and irreparable. The court said: "When this is coupled with the other facts in the cause, it leaves the mind in a state of uncertainty whether the *locus in quo* is the public road, and the case becomes one to be settled by the verdict of a jury. Finally, the alleged nuisance is clearly not one of that character which should invoke the aid of a chancellor. It is but a wall of stone and timber built across the road, a mere barricade to prevent passage, temporary in character, easily removed, and inexpensive. A few hours' work after a conviction by indictment and trial would remove the obstruction at a small cost of money. It is neither permanent nor irreparably injurious. Upon a view of the whole case therefore, we are of opinion it is one where the plaintiff should be sent into the courts of law for his redress, civil or criminal, provided both at common law and by statute. This is not the ordinary case, which was evidently in the mind of the learned judge, of an old and long-known road, clearly indicated by usage, by the recognition of the highway authorities and other sufficient evidence of its lawful location, where the loss of the original evidence is fully supplied by the facts. But here the facts that the road was never opened throughout its entire length, that through the Bunnell farm it was opened many years after the view by private hands, that the surveys lately made had no reliable beginning or ending point, and that the route has been disputed many years, are all reasons to lead a chancellor to doubt and to send the case to a jury, while the obstruction complained of is but an unimportant barricade made to contest the right, and not a permanent or valuable erection, or likely to produce irreparable injury."

In *Sargent* v. *George*, 56 Vt. 627, an injunction was denied, it being shown that the plaintiff had another way, a few rods distant, equally available and in daily use, although the obstructed way added somewhat to the beauty of the premises. The court said: "There is no necessity for more than one way. The

injury to him is nothing more than mere fancy. In order to entitle a party to an abatement of a public nuisance by injunction, he must show that the injury of which he complains is such in its nature and extent as to call for the interposition of a court of equity. *Stanford* v. *Lyon*, 37 N. J. Eq.; High Inj., § 762, note 5. 'Of whatever character it is requisite that the injury complained of should be in order to lay the foundation for this remedy, it is necessary that it should be a substantial, and not merely a technical or inconsequential injury. There must not only be a violation of the orator's rights, but such a violation as is, or will be, attended with actual or serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would interpose by the summary, peculiar, and extraordinary remedy of injunction.' 8 Simons, 194; *Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 565. It is a power to be exercised only in cases of necessity, where other remedies may be inadequate, and then with great discretion and carefulness."

In *Waltz* v. *Foster*, 12 Oreg. 247, the authorities are reviewed, and it is held that the injunction will not be granted unless the right has been established at law or is clear and easy of ascertainment.

TROWBRIDGE v. TRUE.

(52 Conn. 190.)

Injunction — against interference with lateral support.

The right to lateral support of soil will be protected by injunction, although the pecuniary damage threatened is slight, and may be easily compensated in damages. (*See note, p.* 581.)

SUIT for injunction. The opinion states the case. The plaintiff had judgment below.

S. Lucas, for appellant.

D. G. Perkins, for appellee.

CARPENTER, J. This is a suit for damages for an injury to a certain lot of the plaintiff by the digging away by the defendant, William D. True, of the soil of the adjoining lot, belonging to Elfreda True, his wife, the other defendant, and occupied by them both, so as to deprive the plaintiff's land of its lateral support, and to cause it to cave in and fall; and also praying for an injunction against a further threatened digging away of the soil. The court below granted the injunction prayed for and rendered judgment for damages, the judgment being in both cases against both defendants. Both defendants have appealed to this court.

[Omitting minor points.]

The remaining point made by the defendants, and the only one entitled to serious consideration, is that the damage threatened was not sufficient to warrant the granting of an injunction.

It appears that the land of the plaintiff is a lot in the city of Norwich, running through from one street to another, and being about one hundred and twenty-five feet wide on one side, and about fifty-five feet on the other, the depth on the one side being about one hundred and ninety-four feet, and on the other about one hundred and thirty-nine feet. This lot is abutted on the west by the land of Mrs. True, for the distance of one hundred and twenty-five feet. On this last piece of land the defendant, William D. True, has been for some time, and now is, carrying on the business of making cement pipe, for which the soil on his wife's land is of ex-

cellent quality and of a kind difficult to be obtained. For the purpose of thus using it, he has begun at one end of the dividing line to dig away the earth on his own premises to the depth of fifteen feet, and so near to the dividing line that the plaintiff's soil, of its own weight, has fallen into the excavation. The damage so far has been slight, the court awarding but five dollars for it; but precisely what it may be in the future, if the defendant keeps on for the whole extent of the line, is of course uncertain; but manifestly it cannot, as measured in money, be very large. The court has however found that it is "liable to cause irreparable injury to the plaintiff," and it is easy to see that the injury might be very serious.

It is obvious that an injury like this to a city lot may be much more serious in its consequences than a like injury to a remote farm lot. And this is an important fact to be considered in determining whether to grant an injunction, a matter which addresses itself largely to the discretion of the court.

But the defendants say that the injury can easily be compensated in damages, and that where this can be done, an injunction will not be granted. But this is not the rule. The adequacy of damages to make full compensation is of course an important matter to be considered, but is by no means a decisive consideration. High Injunctions, § 467, says: "The jurisdiction of the court in this class of cases does not depend on the value of the property destroyed, but on the question whether its destruction would materially impair the enjoyment of the property as held and occupied at the time of the commission of the trespass." Again, in section 485, he says it is enough "if the injury would cause a constantly recurring grievance." And Story, in his Equity Jurisprudence, vol. 2, § 928, says: "Formerly courts of equity were extremely reluctant to interfere at all (in cases of trespass) even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done, would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If indeed courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in the country." And in *Davis* v. *Londgreen*, 8 Neb. 47, the court say: "It is the nature of the injury rather than the magnitude of the damage inflicted, which forms the basis of this redress."

But courts of equity have been specially ready to protect lands

by injunction against injuries of this class. Thus High Injunctions, § 538, says: "The right to lateral support is regarded as an incident to the ownership of the land, and its infringement has been considered as a nuisance which equity may enjoin. Thus the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of the complainant's soil and fences by removing their lateral support, will be enjoined." The same principle is laid down in 2 Story Eq. Jur., § 929, and in Kerr Injunctions, 366.

In this case the defendant was not enjoined absolutely against digging on his own land in such a way as to endanger the plaintiff's soil, which might have debarred him from a rightful use of the soil on his own land, but only from digging beyond a certain depth and slope unless he provided a sufficient artificial support for the plaintiff's land in the place of the soil removed. This was imposing no serious burden upon the defendant, and we think the injunction, so limited and qualified was properly granted.

Decree affirmed.

The other judges concurred.

NOTE BY THE REPORTER. — See *Farrand* v. *Marshall*, 19 Barb. 380; 21 Barb. 409, where an injunction issued, without any apparent discussion, the court in the latter volume merely saying, "We entertain no doubt of the power to restrain," etc. The discussion was exclusively as to the *right* of lateral support.

In *Phillips* v. *Bordman*, 4 Allen, 147, the removal of part of an ancient party wall, and the erection of a new wall two inches distant was restrained. The court said, "it is clear that they have a plain right to relief."

In *Goldsmith* v. *Elsas*, 53 Ga. 186, the construction of drains and ditches so as to accumulate water against and threaten the stability of a wall, was prohibited.

So mining operations threatening subsidence of the soil were prohibited. *Hunt* v. *Peake*, Johns. Eng. Chy. 705.

HOTCHKISS v. HIGGINS.

(52 Conn. 205.)

Sale — with privilege of return of a part.

Where goods are sold and delivered on a written order, what is used to be accounted for and the balance returned, title to the whole passes on delivery, and parol evidence of a contrary understanding is inadmissible. (*See note, p.* 586.)

REPLEVIN. The opinion states the case. The defendant had judgment below.

A. H. Robertson, for appellant.

E. H. Rogers and *G. J. Clark*, for appellee.

LOOMIS, J. The plaintiff was a licensed liquor merchant in New Haven and received from one J. B. Northrop, propietor of a hotel at Stony Creek, a written order dated July 25, 1883, signed by the latter and directed to the plaintiff as follows: "Please send me by first freight one-half barrel Bourbon whiskey and two baskets of Piper wine, quarts. What is used will account for, and ship rest back to you. I want it for the commercial travellers who will be here Friday to dinner. Expect a big time if pleasant." The liquors were sent as directed and charged to Northrop on the plaintiff's books, and were duly received by Northrop, but while in his possession at Stony Creek and before any of it had been used it was attached by the defendant as deputy sheriff as the property of Northrop in a suit against him and in favor of one Sylvester N. Ryder. The question for our consideration arising upon these facts is whether the property when attached belonged to Northrop or the plaintiff.

It seems to us that the principles invoked in behalf of the plaintiff to show that the title remained in him do not apply to this case. Where personal property has been sold and delivered with the privilege of purchase, but upon the express condition that the title should not pass to the vendee until payment of the price, our courts, in common with many other American authorities, have uniformly upheld the vendor's title, even against the vendee's creditors or sub-

sequent purchasers in good faith and without notice. *Lewis* v. *McCabe*, 49 Conn. 141; s. c., 44 Am. Rep. 217.

In this class of cases the stipulation of the parties that the title should remain in the vendor is controlling. The case at bar lacks this distinguishing feature, and so we must assign it to a different class of contracts.

But the plaintiff says that the contract must be regarded as a conditional sale; that Northrop had a mere option to purchase what he might consume, and that this option was a condition precedent which he had not exercised at the time of the attachment.

There is plausibility in this claim, because we approach the border line, which is often obscure, that separates bailments from sales. Nevertheless there is a manifest distinction between an optional right in the party receiving the goods to purchase, and an optional right to return the same goods in whole or in part. In the former case the title will not pass till the option is determined, while in the latter it passes immediately to the party receiving the goods subject to be returned. Northrup's option was not to purchase if he sold the liquors, but to return the purchase if he did not sell. This distinction is abundantly supported by the authorities.

In *Buswell* v. *Bicknell*, 17 Me. 344, where the owner of a cow delivered her to another on his promise to pay a certain sum of money therefor by a given day, or to return the cow and pay a lesser sum for its use, the property in the cow, it was held, passed immediately from the former to the latter. WESTON, C. J., in delivering the opinion of the court said: "Whether the alternative is to return specifically or in kind, or specifically or to pay a certain sum, the principle is the same. The property in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect. He may do what he will with the article received. If he pays, he fulfills his contract. If he neither pays nor returns, he is liable to an action." And in *Crocker* v. *Gullifer*, 44 Me. 491, the court says: "The general proposition, that a delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving, to pay for or return the goods received, the uniform current of authorities is that such alternative agreement is a sale." The same distinction is recognized and applied in *Holbrook* v. *Armstrong*, 1 Fairf. 31;

Perkins v. *Douglass*, 20 Me. 317; *Dearborn* v. *Turner*, 16 Me. 17, and *Hunt* v. *Wyman*, 100 Mass. 200.

In the light of these distinctions we think the case at bar belongs to the class of agreements usually termed contracts of "sale or return," which are thus defined in Addison on Contracts, book 2, chap. 7, bottom page 532, 8th edition: "When goods are sold under a contract of sale or return the sale is a conditional or defeasible sale. The right of property in the goods passes to the purchaser, subject to be divested out of him and revested in the vendor by a return of the goods according to the terms of the contract." This proposition is strongly supported by the uniform current of authorities. In addition to those cited in the brief for the defendant, which are in point, we cite *Moss* v. *Sweet*, 3 Eng. & L. Eq. 311; *Schlesinger* v. *Stratton*, 9 R. I. 578; *Jameson* v. *Gregory*, 4 Metc. (Ky.) 363; *Johnson* v. *McLane*, 7 Blackf. 501; *Kinney* v. *Bradlee*, 117 Mass. 321; *Martin* v. *Adams*, 104 Mass. 262; Benj. Sales (2d Am. ed.), § 597; Hilliard Sales (3d ed.), p. 28, § 3.

In stating that the doctrine above mentioned is sustained by the uniform current of authorities, it may be thought we have overlooked a class of cases apparently very similar in which a different result was reached. In some of those cases the relation of the parties to the contract has been considered like that of consignor and consignee, or principal and agent; in others the controlling fact was the existence of a general custom, which by implication became a part of the contract, whereby it was understood that the title was to remain in the original owner. Such was the case of *Meldrum* v. *Snow*, 9 Pick. 441, where the plaintiffs in the replevin suit were brewers and had sent to a retailer a large quantity of beer in the plaintiff's casks, which was attached as the property of the retailer while in his cellar. Evidence was given at the trial of a universal custom among brewers and retailers of beer, as beer cannot be removed in warm weather without injury, under which the brewer in the spring delivers to the retailer such quantity of beer as he expects to retail in the ensuing season; the barrels belong to the brewer and are to be returned to him when emptied; the retailer pays for all the beer he vends in the course of the season, but if the beer becomes sour or stale or is lost by fire or other casualty, the loss falls on the brewer, and if any remains at the end of the season it may be returned. It was held that the beer could not be attached as the property of the retailer. The court in giving the opinion

said: "Retailers who take beer to sell are often persons of very small property, and the custom appears to be so general and well known that the retailer would not be supposed to be the owner of the beer. No injury therefore can arise to creditors of the retailer. And it being beneficial to the community to introduce the use of beer, public policy would justify us in favoring the custom."

In the case at bar there was no pretense of any custom or any peculiar circumstances that might require a modification of the doctrine as to sale or return. What the dictate of public policy might be we refrain from discussing.

But the plaintiff further says, that although he made no attempt to prove any custom affecting the question of title, yet he did offer to prove the secret and unexpressed understanding of each party, but was prevented by the ruling of the court, and he bases his appeal in part upon this ground.

The plaintiff was asked by his counsel, "Did you interpret and understand this order to mean, and act upon the understanding of the order, that the property named in the complaint and order should be and remain your property until disposed of by said Northrop?" And Northrop was asked by the plaintiff, "At the time you gave the order did you intend and consider that the property asked for should be and remain the property of Hotchkiss until sold by you, if received?" A very brief discussion will suffice to show that the court did not err in rejecting this evidence.

The bargain was consummated solely through the written order, unaccompanied by any verbal declarations of any kind. The parties were far apart and what each thought was unknown to the other, and consequently had no influence in producing the result. All the words indicative of intent are embodied in the writing, and there is no such ambiguity as would allow the introduction of any extrinsic evidence whatever, much less such evidence as we are considering. When the contract is in writing the question always is one of construction merely, that is, what the party has expressed by his words, and not what he intended to express. The actual intention as an independent fact can only be shown where the language of the writing is applicable indifferently to more than one object. 3 Phill. Ev., Cow. & Hills' Notes, part 2d, p. 1388; *Fairfield* v. *Lawson*, 50 Conn. 501.

In *Foster* v. *Ropes*, 111 Mass. 16, the court, with reference to the effect of evidence very similar to that in the case at bar, said:

"In all cases however the intention of the parties as to the time when the title is to pass can be ascertained only from the terms of the agreement, as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifest at the time the bargain is made. The rights of the parties under the contract cannot be affected by their undisclosed purposes, nor by their understanding of its legal effect." This was said with reference to a mere verbal contract. The principle would apply to a written contract with even greater force, as it would be reinforced by another rule to which we have before referred. *Glendale Manfg. Co.* v. *Protection Insurance Co.*, 21 Conn. 37.

There was no error in the judgment and rulings of the court complained of.

Judgment affirmed.

The other judges concurred.

NOTE BY THE REPORTER.— In *Schlesinger* v. *Stratton*, 9 R. I. 578, the court said: "The contract in this case belongs to a class of contracts often called 'contracts of sale or return,' being upon a condition that the buyer may return the goods within a fixed or reasonable time at his option. It has been held that goods so sold pass to the purchaser, subject to the option in him to return them, and that if he fails to exercise the option within the proper time the price of the goods may be recovered as upon an absolute sale. *Moss* v. *Sweet*, 3 Eng. L. & E. 311; s. c., 16 Q. B. 493; *Bianchi* v. *Nash*, 1 M. & W. 545; *Beverly* v. *Lincoln Gas-light & Coke Co.*, 6 A. & E. 829. In *Moss* v. *Sweet*, WIGHTMAN, J., said: 'The current of authorities has established that this contract means that the goods are sold absolutely, unless the buyer returns them within a reasonable time.' In that case no time for the return was fixed.

"That the property passes, notwithstanding an option in the purchaser to return, was also held in *Dearborn* v. *Turner*, 16 Me. 17. In that case a cow and calf were delivered by the plaintiff to the defendant, on the defendant's written promise to return the same cow within the year, with a calf by her side, or to pay $22.00. The court held that the defendant, having the option to return or pay the property passed to him, and he was at liberty to sell the cow within the year. See also *Orcutt* v. *Nelson*, 1 Gray, 536."

SIMMONDS v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

(53 Conn. 264.)

Railroad — communication of fire — proximate cause.

Fire caught from the sparks of the defendant's locomotive on the land of D. The defendant's servants were successfully extinguishing it when D. desired them to desist, as he wished to have it burn up the bogs. They desisted, but it communicated to and injured the plaintiff's adjoining land. *Held*, that the defendant was liable under the statute.

ACTION for injury to land by fire. The opinion states the case. The plaintiff had judgment below.

E. D. Robbins, for appellant.

J. P. Andrews, for appellee.

LOOMIS, J. A fire was communicated by a locomotive engine of the defendant to land of one Davis adjacent to the defendant's railroad track. The fire by its own action and by the operation of natural causes spread and passed across the land of Davis to the land of the plaintiff, where the injury set forth in the complaint was done.

While the fire was burning on the land of Davis the track-foreman of the defendant, with men under him, commenced to extinguish it, which could easily have been accomplished. While the track-foreman and his men were so engaged, Davis came, and said he preferred that the bogs on his land should burn, if the fire was subdued elsewhere so that it could not spread. The fire then was extinguished elsewhere, and thereupon the track-foreman and his men left, leaving some of the bogs burning.

The court finds that the servants of the defendant were not prevented by Davis from extinguishing the fire, but that they supposed, as Davis did, that no injury could result if the fire was left in the bogs. In this however they were disappointed, for the fire penetrated to the peat beneath the bogs and so spread to the plaintiff's land, which adjoined the land of Davis on the east. These facts are made the basis of the recovery of damages of the defendant by virtue of the provisions of a statute enacted in 1881 (acts of that year, chap. 92), the first section of which is as follows: "Where

any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

Aside from the effect of the interposition of Davis, which we will presently consider, it is obvious that the facts are ample to bring the case within the provisions of the statute. The right of the plaintiff to recover is not dependent at all upon any negligence on the part of the defendant as at common law, nor is it material that the fire was not directly communicated to the plaintiff's land, but reached it through the intervening land of another.

In *Perley* v. *Eastern R. R. Co.*, 98 Mass. 99, under a similar statute, the sparks from the locomotive engine first set fire to the grass in the open field near by, which spread over the premises of several different owners to the plaintiff's wood lot half a mile distant, where the injury was done for which the railroad company was held liable.

Such a construction of our statute the defendant does not seek to controvert, but relies solely on the principle that the intervention of the independent act of Davis, between the act of the defendant complained of and the injury to the plaintiff, constitutes in law the proximate cause of the injury, and that therefore the act of the defendant is too remote.

This introduces us to a realm of law abounding in nice distinctions, which however need not be particularly discussed. The general principle which the defendant invokes is established by a strong array of authorities, but the facts as found by the court would seem to forbid its application to the present case.

In the first place, it is difficult to discover in the independent act of Davis a sufficient power to stand as the cause of the injury. It is not pretended that he contributed any new force or power whatever to modify the result of the original act. The argument is merely that he adopted the fire as his own, but in so doing he did nothing to increase or extend it, but simply let it alone, so that

the original cause was allowed to work out its natural consequences. Then too this adoption of the fire was a matter confined to Davis and the defendant, and was voluntarily assented to by the latter. How then could it relieve the defendant of a primary liability which the law imposes in favor of third persons? Could the defendant delegate its duty to another and thereby escape liability? If the servants of the defendant were obliged by law to leave the premises of Davis upon his suggestion before the fire was extinguished, it might well be contended that a new power had intervened, which made the act of the defendant too remote. But nothing of this kind happened. The finding says that Davis did not prevent the extinguishment of the fire. Whether he could have done so rightfully we are not now called upon to determine.

In making the railroad corporations insurers against the consequences of fire communicated by their locomotive engines, the law implies in them the right and duty to put it out when communicated.

We know that under the general police power of a State and by the law of overruling necessity, private property during a fire may be destroyed to prevent the spreading of a conflagration. Whether this principle would allow a railroad corporation to enter upon land against the will of the owner to extinguish a small fire which under the circumstances did not at the time appear to be threatening to other property, may admit of some question, which we will not now attempt to solve. It will suffice for the purposes of this case that there was no prohibition at all. Assuming that the statute is valid it makes railroad corporations insurers of all the property along the road liable to be burned by the running of locomotive engines. As soon as a fire is thus kindled the duty arises to prevent its spreading to other adjoining lands. The obligation is very different from that of the land-owner at common law, who is liable only for the consequences of his negligence as to fire which he kindles on his own land.

The railroad corporation is bound at all hazards to prevent the fire from spreading, and is liable inevitably unless there is contributory negligence on the part of the land-owner. Now the duty which the defendant owed the plaintiff could not be excused by an arrangement made with a third person without the plaintiff's consent. One may part with his rights, but can never cancel his duties without the consent of those to whom they are due.

For these reasons we think the intervention of Davis was not sufficient to break the connection between the act of the defendant complained of and the resulting injury to the plaintiff for which this suit is brought.

There was no error in the judgment complained of.

The other judges concurred.

Darrigan v. New York and New England Railroad Company.

(52 Conn. 285.)

Master and servant — fellow-servants — train-dispatcher and engineer.

A railway train-dispatcher and a locomotive engineer are not fellow-servants.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

S. E. Baldwin and *E. D. Robbins*, for appellant.

C. H. Briscoe and *J. P. Andrews*, for appellee.

Carpenter, J. On December 14, 1882, there were two special or irregular trains going in opposite directions on the western division of the defendant's single track railroad. These trains were run as directed by telegrams from the train-dispatcher in the division superintendent's office at Hartford. The train going east was a construction train. About twelve o'clock it was at Southford station, where it received an order from the train-dispatcher to "run to Towantic as a special train ahead of No. 6, and then work between Towantic and Waterbury as a special train until six o'clock P. M., and protect themselves with flags against Goble special east after 1:30 P. M." The above order was given by the chief train-dispatcher. Soon after he was relieved in the regular course of business by an assistant. A little before five o'clock the same afternoon, the plaintiff's train going west received at Waterbury from the assistant train-dispatcher an order to run to Brewster's as a special. In obeying this order the two trains collided and the plaintiff was

* See *Mathews* v. *Case* (61 Wis. 491), 50 Am. Rep. 151.

seriously injured. The court below rendered judgment for the plaintiff, and the defendant appealed.

The negligence of the train-dispatcher is admitted, but the defendant claimed that such negligence was the negligence of a fellow-servant, for which it is not liable, and that is the first question presented for our consideration.

In *Wilson* v. *Willimantic Linen Company*, 50 Conn. 433, this court held that a master was bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances. An application of that principle to a railroad company would require it to keep its road-bed, rolling stock, tools and implements in good and safe condition, to adopt rules and regulations adapted to its business so as to guard against accidents, and to employ skillful and competent agents and employees in every department of its service. In short, all employers shall be vigilant in the use of means and in the adoption of measures to make the servants in their employ reasonably safe. To that extent the master assumes the risk. On the other hand the servant assumes the natural and ordinary risks incident to the business, including those arising from the negligence of his fellow-servants.

To a certain extent the distinction between the two classes of risks is obvious, and in most cases it is easy to determine on which side of the dividing line the case falls; but along the line on either side is a wide margin of debatable ground. It would be idle to attempt to notice any considerable number of the many cases that have been decided on this subject. They are so conflicting that it is impossible to reconcile them, and it is equally impossible to extract from them any general rule or principle by which future cases, or any considerable portion of them, may be determined. Differing views are entertained by different courts in similar cases. To some extent each case is determined by the peculiar circumstances attending it. Nor are the courts uniform in their statement of the principles upon which the master's exemption rests. In an early case the servants are represented as engaged in a joint undertaking in which no one, as respects the others, represents the master, and in which each in his separate department does represent his principal, and in which each stipulates for the performance of his several part. Other cases place it upon the ground that there is an implied contract by the servant to assume the risks arising from the negligence of his fellow-servants, and others still rest it upon grounds of public

policy. On whatever ground it is placed the practical difficulty remains — who are fellow-servants, and who represent the company?

In *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross*, 112 U. S. 377, the Supreme Court of the United States, by a divided court, held that the company was liable to an engineer for the negligence of the conductor. The court say: "There is in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters and other subordinates employed. He is in fact, and should be treated as the personal representative of the corporation for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of our railway corporations must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated, that subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and every thing essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation." Then, after citing several cases, the court adds: "We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs

when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company; and therefore that for injuries resulting from his negligent acts the company is responsible." We do not make these quotations as necessarily expressing our views upon a case like that, for the case at bar does not call for it, but for the purpose of showing the position of that court.

In *Sheehan* v. *N. Y. Cent., etc., R. Co.*, 91 N. Y. 332, he facts were these: Train 337, an irregular or special train called "Wild Cat," was going west from Auburn. Train 50 was a regular train going east from Cayuga. The latter was due at Cayuga at 4:40 P. M., and would go east at 4:45 by schedule. At 4:46 the superintendent telegraphed to 337, "Wild Cat to Cayuga regardless of No. 50." No notice was given to No. 50, and no rule of the company required it, but the superintendent telegraphed to the telegraph operator at Cayuga to hold No. 50 for orders. The operator told the conductor to hold No. 50 for train No. 61. He neither exhibited nor delivered any message; no rule of the company required him to do either. No. 61 came in soon after and No. 50 started toward Auburn. In a few moments it collided with No. 337 and the plaintiff was injured. The court say: "It was not disputed at the trial, nor is it upon this appeal, that the dispatching of train 337 and the holding of train 50 were within the province of the superintendent, nor that in respect thereto he represented the defendant in its corporate capacity. Clearly he held that relation."

The defendant's counsel, in commenting upon that case, suggest that the case turned upon the defective nature of the general rules governing the movements of trains, which permitted the telegraph operator to deliver a train order verbally to the conductor. In respect to this the court say: "The peremptory order of the superintendent to go forward regardless of No. 50 was an assurance that the track would be free and safe for the journey, and required the defendant to take reasonable precautions to make it so. The rules of the company did not require the telegraph operator to submit the message received by him to the conductor or engineer of train 50, nor a communication back from these persons that they had received and understood the order; an omission of either circumstance was the act of the defendants, and in the absence of other precautions might properly be held to constitute negligence." It is obvious

that the court regarded the superintendent, who acted as train-dispatcher, as the representative of the corporation, and that his negligence was the negligence of the defendant. He failed to give an effective order to hold No. 50, which he might and should have done regardless of rules. In that he, and through him the company, was negligent. And none the less so that the company had failed to establish suitable rules. The intimation of the court is clear that the company was responsible on both grounds.

In *Chicago, etc., R. Co.* v. *McLallen*, 84 Ill. 109, the conductor of a special freight train received an order from the assistant superintendent directing him to run fifteen minutes behind the time of a regular freight train. In doing so he came in collision with a regular passenger train going in the opposite direction. The conductor was killed. No notice was given to the passenger train. The company was held liable. The court say: "As between the conductor and company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation. His orders to the conductor of a train are essentially the orders of the employer. This rule applies as well to all orders issued by his assistants in office and issued in his name. These orders were all signed in the name of Campbell, the assistant superintendent. If those intrusted by him with the management of the business of the corporation, by orders issued in his name, neglect to issue a necessary order, that is his neglect and the negligence of the corporation."

In Kansas in a similar case the court say: "And those higher officers, agents or servants cannot, with any degree of propriety, be termed fellow-servants with the other employees who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents or servants. Such higher officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, and in fact to be the principal.

It is conceded by the defendant's counsel that in Ohio, Illinois, Tennessee and Kentucky the law is substantially as indicated by the authorities above referred to.

On the other hand it must be conceded that the cases above named, and others of like import, are a departure from the general current of authorities elsewhere. A conductor and brakeman have been held to be fellow-servants in Indiana and Michigan. *Thayer*

v. *St. Louis, etc., R. Co.*, 22 Ind. 26; *Smith* v. *Flint, etc., R. Co.*, 46 Mich. 258; s. c., 41 Am. Rep. 161. So also an overseer and a laborer under his charge. *Brown* v. *Winona & St. Peter R. Co.*, 27 Minn. 162; s. c., 38 Am. Rep. 285. And a foreman and workman under him. *Keystone Bridge Co.* v. *Newbury*, 96 Penn. St. 246; s. c., 42 Am. Rep. 543; *Danbert* v. *Picket*, 4 Mo. App. 591; *Hoth* v. *Peters*, 55 Wis. 405; *Peterson* v. *Whitebreast Coal & Mining Co.*, 50 Iowa, 674; s. c., 32 Am. Rep. 143. In Massachusetts they have pretty rigidly adhered to the doctrine of the leading case of *Farwell* v. *Boston & Worcester R. Co.*, 4 Metc. 49. In one case there was an apparent weakening. *Ford* v. *Fitchburg R. Co.*, 110 Mass. 260; s. c., 14 Am. Rep. 598. But the court soon took pains to prevent that case from being regarded as a departure from the general rule. *Holden* v. *Fitchburg R. Co.*, 129 Mass. 268; s. c., 37 Am. Rep. 343. In that case GRAY, C. J., says: "If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions, and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work." In another place he adds: "And it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff."

In *Feltham* v. *England*, L. R., 2 Q. B. 33, it is said that the rule of exemption is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey. In *Wilson* v. *Merry*, L. R., 1 H. L., Sc. App. 326, the lord chancellor says: "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do."

It seems to us that the rule prevailing in Massachusetts, and which did prevail in England previous to the passage of the "Employers' Liability Act," hereinafter referred to, unduly enlarges the exemption and confines the liability of employers within too narrow limits. If such a rule had been followed in *Wilson* v. *Willimantic*

Linen Co., before referred to, the decision must have been otherwise. The rule we think does not sufficiently recognize the distinction between agents, managers and even superintendents, on the one hand, and mere servants and common laborers on the other, between duties which the master is required to perform and work which is ordinarily performed by employeer. It makes little allowance for emergencies, and does not sufficiently regard the obvious fact that cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience — some one must hear and obey. To make no discrimination, but in all cases to place those who are invested with authority to direct and control on the same footing with those whose duty it is merely to perform as directed without discretion and without responsibility, seems to us unwise and impolitic.

The duties of a master in most cases are easily distinguished from those of an employee. The proprietor of a cotton mill is bound to have a safe building, a safe dam or engine, and safe machinery; and he is bound to keep them so. To do that he must employ skilled mechanics, who perform his duties. Their negligence is his negligence. The English rule says that he has done his whole duty when he has employed skillful men to do his work. We think that a more salutary rule would be to require him to see that the work is actually done with care and skill; to require him to inspect the work personally, if competent, and if not, to employ others who are, and who will exercise more than ordinary care, so as to make it reasonably certain that the operatives will be surrounded by safe machinery and appliances. The liability of the master for the negligence of such agents is a surer guaranty of safety than immunity.

The diligence required will be the greater as the danger and hazards increase. The operation of a railroad requires a greater degree of care than the operation of a cotton mill. It is the duty of a railroad corporation to prepare a time-table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be

done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them — a train-dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction, that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service.

A reference to the rules of the company in connection with the facts will serve to show that the views above expressed are applicable to this case. Here were two irregular trains to be moved in opposite directions on a single track railroad so as to pass each other. It was necessary that their movements should be directed by instructions emanating from some one intelligent source. The rules of the company provide for moving trains by special orders. One rule is, "All orders shall be given by a superintendent, or by a dispatcher appointed for that purpose, under directions of a superintendent; no other person will be allowed to give them." Another rule is, "Division superintendents are supreme on their respective divisions, and are responsible only to the management for such orders as they may give." The following is from the finding of the court: "So far as the printed rules and regulations of the company did not govern, the train-dispatcher was authorized to give such orders for the movement and protection of trains as he saw fit, and while so acting he had all the authority of, and acted in the stead and place of the division superintendent."

The train-dispatcher then, in respect to the matter of moving these trains, was supreme. The whole power of the corporation, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead.

The engineer was bound to obey his order. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. He received an order to go west from Waterbury on a single track road at a time when another train was approaching Waterbury from the west. The order was imperative and it required of him implicit obedience. He obeyed. He did not then know the consequences, but the company did or should have known. He conformed to the order as he was bound to; and while so conforming, and as the direct consequence thereof, he was injured. Reason, justice and law require that the company should be held responsible.

Another rule provides that "in emergencies each employee must promptly obey the orders of any superior officer." By that rule the company made the order of that officer, whoever he may be, and of whatever grade he may be, its own. If the order is an improper one, and in executing it, another employee is injured, the company should be responsible. In such a case the grade of service becomes and is material.

That rule too in its spirit had an application to the case. There was something in the nature of an emergency. There was no room for divided counsel; there must be unity of purpose and one mind must control. That power and duty devolved upon the train-dispatcher.

It is worthy of notice that the principles which we think should govern this case have been embodied in an act of Parliament and are now the law of England. The decisions of her courts on this question have been overruled by statute. In 1880 the "Employers' Liability Act" was passed, the first section of which is as follows:

"When, after the commencement of this act, personal injury is caused to a workman —(1) By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, whilst in the service of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, when such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer;

or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway — the workman, or in case the injury results in death, the legal personal representative of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." The act limits the amount to be recovered in certain cases; and will cease to be operative at the end of seven years unless re-enacted.

[Omitting minor matters.]

For these reasons we do not order a new trial.

New trial denied.

GRANGER, J., dissented.

SECURITY COMPANY v. BRYANT.

(52 Conn. 311.)

Will — bequest in lieu of dower — abatement.

A bequest in lieu of dower, accepted, is not liable to abatement.

CONSTRUCTION of a will. The opinion states the case.

H. C. Robinsoon and *C. E. Gross*, for appellant.

J. R. Buck, for appellees.

LOOMIS, J. The principal question for review in this case relates to the construction of the third, fourth and fifteenth clauses of the will of Gardner P. Barber, deceased.

The third clause is as follows: "I give, devise and bequeath unto my beloved wife, Abby H. Barber, to her and her heirs forever, the sum of $50,000, the same to be in lieu of dower." The fourth clause gives $25,000 in trust to Mrs. Barber, for the use of Lizzie G. Barber (an adopted daughter), and after her death the principal sum to be paid to her children, but if no children survive her, then $5,000 of the principal sum is to be given to her husband, and the balance to Mrs. Barber and her heirs. Following this are nine

clauses containing as many legacies of money to different persons, aggregating $21,000, making in all $96,000 of legacies payable in money.

There is a general bequest of the rest and residue of the estate, both real and personal, to his wife; then follows the fifteenth clause, which is as follows: "I hereby make, constitute and appoint my beloved wife, Abby H. Barber, and Caleb M. Holbrook, to be executors of this my last will and testament; and I hereby direct my said executors that if my said estate shall not be sufficient to pay in full the aforesaid legacies, then the devise to my beloved wife, Abby H. Barber, and to Abby H. Barber in trust for Lizzie G. Barber, shall be paid first and in full, and the other devises *pro rata*."

Mrs. Barber accepted the provisions of the will. The record shows that the assets of the estate do not exceed $48,000, with which to pay legacies calling for $96,000.

The precise question in controversy is, whether the two legacies, to Abby H. Barber $50,000, and to Abby H. Barber, trustee for Lizzie G. Barber, $25,000, abate *pro rata*, or whether the widow has the preference by virtue of her position as purchaser of the testamentary estate given for the relinquishment of her dower.

The law is well settled by the uniform current of authorities that a bequest in lieu of dower, accepted by election, is so far based upon a valuable consideration that it has priority over all other legacies and will not abate with them. Such is the doctrine of this court in *Lord* v. *Lord*, 23 Conn. 327.

But the learned counsel for the defendant suggested that the doctrine as to this State was not well founded, because the distinction between dower at common law and that which obtains in this jurisdiction had been overlooked. At common law the right attached to all the lands of which the husband was ever seised during coverture, while under our statute it attaches only to the real estate of which he died possessed. Upon this distinction it was argued, that while there would be a good consideration for the relinquishment of the dower where the common law prevails, there could be no valid consideration under our law. This argument assumed that the consideration must consist in the relinquishment of a title vested in the wife during coverture. This, we think, is a misapprehension. The consideration is the relinquishment of dower for the testamentary gift, but the contract is not made during coverture. The husband's offer of a price for his wife's legal estate is only made

by the will, which takes effect upon his death, and the wife's acceptance can only be after that event; so that what the wife relinquishes by her election must be the dower estate which vested in her at her husband's decease. The consideration therefore is of the same nature precisely under our statute as under the common law, although under the latter it may happen to be of greater value, which fact has no materiality in the argument. When the wife accepts the offer in the will she parts with a vested legal estate, and takes instead the testamentary compensation by virtue of a contract then made. The result of our brief review is to confirm the old doctrine that the widow takes as a purchaser, and therefore we conclude that the legacy to her, constituting the purchase-money, must be paid in preference to other legacies, which in the comparison are considered mere bounties.

This however does not conclude the matter at issue. We must again recur to the will to determine what price was offered for the dower, and upon what conditions. If the latter require the sum first named to be reduced, then the reduced sum is regarded as the price offered. But the fact that the wife takes her legacy as a purchaser will always be important when the words of the condition are of doubtful import or application. The offer of a specific sum in lieu of dower is always to be construed as if the words "to be paid in full in preference to all other legacies" were added; hence if a subsequent condition does not make it clear that the testator intended to reduce the sum offered, it must stand with the preference attached. With these considerations in view we come to the question as to the construction to be given to the fifteenth clause. Did the testator thereby intend to take away the preference which the law would otherwise give to his wife over the legacy to the daughter, and to make both legacies abate *pro rata* in the event of a deficiency?

We find no words which make such intent manifest, and the probabilities are all against it. It is evident that the contingency of a deficiency so great as to render it impossible to pay the legacies to the wife and daughter was never thought of, much less provided for. It was thought possible that there might be less than $96,000, but no such shrinkage as to reduce the assets to $75,000. The testator therefore brought these nine items into one class to share a *pro rata* abatement, but where the testator made only one class subject to abatement, the defendant would make two. The

claim for such a construction is founded on the words "to be paid first and in full," as applied to the legacies to the wife and daughter. These words, it is argued, place the two legacies in question on the same plane in the mind of the testator, not for the purpose of withdrawing them from the *pro rata* class and preserving the status given previously in the will, but for the purpose of repealing (so to speak) the preference given by the law to the wife over the daughter. This view we cannot accept. The words import an undoubting belief in the mind of the testator that these two legacies could and therefore should be paid in full; but it by no means follows that they indicate the mind of the testator in case they could not be paid in full. In case of a shrinkage of assets below the $96,000 called for to meet the eleven items in the will, the testator wanted the loss to fall on the more remote objects of his bounty and not upon the wife and daughter; hence he very naturally said, for the purpose of protecting their legacies and of leaving them just as they stood previously in the will, that they were to be paid first and in full, while the others should abate *pro rata*.

The rulings of the court rejecting certain parol evidence were so clearly right that we refrain from any discussion of the matter.

There was no error in the judgment complained of.

GRANGER, J., dissented.

BURTON v. BRIDGEPORT SAVINGS BANK.

(52 Conn. 398.)

Gift — savings bank deposit.

Alden Burton at his death left two savings bank deposit books, one in his own name, the other in that of "James Burton" (his son) "order of Alden Burton." On the last page of each was an order, signed by him, to pay the deposit to James, that in the former book being absolute, that in the other book directing the payment to be made at his death. Deposits and drafts were made after the dates of the orders. Neither of the books was delivered to James, and he had no knowledge of them. *Held*, not a valid gift.*

ACTION for a bank deposit. The opinion states the case. The plaintiff had judgment below.

* See *Pope* v. *Burlington Savings Bank* (56 Vt. 284), 48 Am. Rep. 781.

C. Thompson, for appelant.

W. K. Seeley, for appellee.

CARPENTER, J. This is an action to recover money deposited in the Bridgeport Savings Bank by Alden Burton, deceased, during his life-time. The amount claimed is evidenced by two deposit books; one, No. 10065, is in the name of Alden Burton; the other, No. 21541, is in the name of "James Burton, order of Alden Burton." It is conceded that all the deposits credited on these books were made by Alden Burton from his own funds. He died February 26, 1879, leaving a widow and two sons. He left a will giving to the widow the use of one-third of his personal property during life, and to the sons in substance the residue of the estate.

On the last page of book No. 10065, under the words "an order," partly in print and partly in writing, is the following:

"BRIDGEPORT, *April* 9, 1868.

"Treasurer of Bridgeport Savings Bank:

"Pay James Burton $\frac{00}{100}$ dolls., or what may be due on my deposit book No. .

"ALDEN BURTON.

"Witnessed by George Sterling."

Mr. Sterling was the secretary and treasurer of the savings bank at the time he witnessed the order. There were no additional deposits entered on the book after April 9, 1868, but there were sums of money from $15, to $1,500, drawn out after that date and prior to May 28, 1878, amounting to $2,957.49.

The other book, No. 21541, had on its last page, partly in print and partly in writing, the following order:

"BRIDGEPORT, *August* 12, 1871.

"Treasurer of Bridgeport Savings Bank:

"At my decease pay James Burton $\frac{00}{100}$ dolls., what may be due on my deposit book No.

"ALDEN BURTON."

Deposits were made and money drawn out after the date of this order, which were entered on the book.

These books with others were placed in a large envelope and left at the banking house with the treasurer, and Alden Burton had access to them whenever he pleased as long as he lived. This envel-

ope had written on the face of it in the upper right hand corner these words: "Deliver this to James Burton after my decease with all the books;" but by whom, when, or where they were written, did not appear, nor did it appear what the contents of the package were when written, other than as stated above. It was not in the handwriting of Alden Burton or of any one connected with the bank. For aught that appeared it might have been written many years ago.

James was the son of Alden; was named in the will as one of the executors, but never served, and when this suit was brought was subject to a conservator. He never had possession of the bank books, and had no knowledge of them, or that his name was connected with them during the life-time of the father.

These are the material facts, and upon them the defendant claims that the plaintiff could not maintain his suit, among other reasons, because he had "neither the possession of nor the title to said books;" and because "there was no legal and valid gift of said books to the plaintiff." These claims the court overruled and rendered judgment for the plaintiff to recover the amount represented by the books. The defendant appealed.

There are other questions in the case, but the only one we have any occasion to discuss is whether there was a valid, effective gift of the money deposited to the plaintiff during the life-time of Alden Burton.

In *Camp's Appeal*, 36 Conn. 88; s. c., 4 Am. Rep. 39, the donor gave to his nephew certain bank books, accompanied with declarations showing that he intended a present gift of the money deposited and represented by the books. It was claimed that inasmuch as there was no order for the payment of the money there was no delivery of the gift. This court held that the delivery of the books, thereby intending to give the money, vested in the nephew an equitable title to the money, and regarded it as a completed gift.

This case is distinguishable from that in two particulars; here there was no delivery of the books to the plaintiff, and there is no finding that Alden Burton intended a present gift. We are now asked not only to dispense with an order for the payment of the money, but also with a delivery of the books, and even an intention to make a present gift.

The case of *Minor* v. *Rogers*, 40 Conn. 512; s. c., 16 Am. Rep. 69, is more like the present one. The donor, possessed of consid-

erable property, deposited $250 in his own name as trustee for the plaintiff, then a minor. She told the plaintiff's father that she had deposited it for the plaintiff, and that he would need it in getting his education. And the court found that at the time she made the deposit she intended it as a gift to the plaintiff to take effect either then or at some future time. She subsequently drew out the money for her own use, and died, leaving a will by which she gave the plaintiff nothing. The court held that the money so deposited was a present executed gift.

In *Kerrigan* v. *Rautigan*, 43 Conn. 17, the donor made a deposit in the name of the donee, a minor, naming her mother as guardian. It was found that she then intended to make a gift of the money to the donee.

The distinction between the case at bar and the two cases last cited consists not so much in the circumstance that in each of those cases the donee was a minor, while in this case he was of full age, as in the fact found that the donor in each case intended a present gift, no such intention being found in the present case. The circumstance that the donor in the one case made the deposit subject to his control as trustee, and in the other she made it subject to the order of a third person as guardian, did not prevent the gift from taking effect presently, such being the intention of the donors. In this case we look in vain for any such intention on the part of Alden Burton. It is not found in express terms, and the facts stated as matter of law do not show such an intention.

The fact that a part of the deposits were made in the plaintiff's name affords the strongest evidence of an intention to make a gift; but that does not necessarily show an intention to make a present gift; it is equally consistent with an intention to have the gift take effect at some future time.

The direction on the envelope, "Deliver this to James Burton after my decease, with all the books," is not of much weight. It is not certain by whom or for what purpose that was written. But if it is to be regarded as the language of Alden Burton, its meaning may be to deliver it to him as executor. So far as this direction is to be considered as the direction of the father, and to refer to the books now in question, it clearly shows that the father did not intend that the books should be delivered to the son for any purpose until after his decease.

The absence of any declaration by the father to the son or others

that he intended to give the money to the son during his life is significant, especially as there were two occasions, once when he went to the bank with the conservator, and once with the son, when we should naturally expect, if he intended to give the money then or previously deposited to his son to take effect immediately, that he would say so, rather than use an indefinite, vague expression that he was going to deposit money for him.

The fact also, that one of the books was in his own name, that the other was at his absolute control, that he kept the books in his own possession, and drew out and deposited money as he pleased and as long as he lived, is important.

But the circumstances which seem to be of controlling weight are the two orders which he signed, one in each of the books. He was a depositor in the bank for twenty years before his death, and was a corporate member and a trustee. As such he knew the regulations of the bank and what was required in order to effect a valid transfer of the money therein deposited. He had that subject in his mind and acted upon it so far as to sign the orders referred to. The one in the book standing in his own name was payable to his son without limitation as to time, but it was never delivered. The one in the book standing in the name of "James Burton, order of Alden Burton," was in terms to pay at his decease. That order too was never delivered. For some reason, if he ever intended to give the money to his son, he never consummated the gift by vesting in him either the legal or equitable title.

The law will recognize and enforce gifts where they are clearly established if creditors are not thereby prejudiced; but claims of this character are so open to fraud, and so liable to be made, especially against estates of deceased persons, when there is little foundation for them, that courts will not regard them with favor, and will not sustain them unless fully proved; in other words, there is no presumption in their favor.

The court did not find in terms that there was a gift during the life-time of Alden Burton, and the facts stated fail to establish one.

There was error in the judgment rendered by the court below, and a new trial must be granted.

The other judges concurred.

Erie Preserving Company v. Miller.

(53 Conn. 444.)

Evidence — memoranda — copies.

Where a railroad freight agent is required to testify as to the quantity of certain freight, and the times of receiving it, and testifies that he has no knowledge except that obtained from the way bills in the office, he may testify from copies of such way bills made by himself.

ACTION for breach of contract. The opinion states the point.

J. J. Penrose and *C. E. Searls,* for appellant.

G. S. F. Stoddard and *L. M. Child,* for appellee.

Granger, J. The point to which the evidence excepted to in the court below related was, whether the plaintiffs furnished a sufficient number of crates to satisfy their contract. To prove that they did so, they offered the evidence of one Sharpe, who testified that he was at the time the forwarding freight clerk of the New York and New England Railroad Company at Putnam, whence the crates were sent, and that a large number of empty crates were consigned to and received by the plaintiffs at Putnam during the fall of 1882; and that the witness, for the purpose of refreshing his recollection as to the number of crates so received and the times when received, referred to certain memoranda in his hands which he testified were true copies of the way-bills in the office, all of which he had examined, and that he had no knowledge upon the subject other than that obtained by inspection of the way-bills. The defendant objected to the evidence because the original way-bills were not produced and identified by the witness; but the court overruled the objection and admitted the evidence.

It is a well-settled rule that a witness may refer to memoranda made by himself or by others, for the purpose of refreshing his memory, but it must be for the sole purpose of refreshing his memory, not for the purpose of gaining entirely original information from them.

Whether the witness in the present case brought himself within that rule it is not necessary for us to decide; for the objection taken

was solely to his use as memoranda of copies of the way-bills and not the originals. This was a matter of no importance. A witness may refresh his memory as to dates before leaving home, by turning to entries on his account-book, and may make copies of such entries to use upon the witness stand. The entries or memoranda are not evidence in themselves. They do not go before the jury. Their office is solely to refresh the witness's recollection, and they are his private property for that purpose. If the way-bills here had been offered in evidence the objection that copies and not originals were introduced would have been pertinent, but that objection had no pertinency to the case as it stood. The objection should have been to the witness' testifying at all to that of which he had no personal knowledge.

This seems perhaps a narrow ground for the decision of the case to rest upon. But we feel it our duty not to reverse a judgment which seems to have been a just one, and probably was not affected by the use of copies by the witness instead of the originals, unless the objection to the supposed error is so taken as to require such reversal.

There is no error on the record.

The other judges concurred.

Holcomb v. Town of Winchester.

(32 Conn. 447.)

Statute — "debt" — claim in tort.

A claim in tort, not in judgment, is not a "debt" within the meaning of the statute as to foreign attachment.

ATTACHMENT. The opinion states the case. The plaintiff had judgment below.

P. S. Byrant, for appellants.

F. A. Jewell, for appellee.

Loomis, J. This is a complaint of *scire facias* against the defendant town as the debtor of one Tuttle, based upon a foreign attach-

ment served upon the town in which Tuttle was defendant. The claimed indebtedness of the town was predicated solely upon these facts: Tuttle had brought a suit against the town to recover damages for a personal injury received through a defective highway in consequence of the negligence of the town. On the 30th of August, 1883, the town suffered a default and moved for a hearing in damages. On the 13th of September next following the town was served with the process of foreign attachment in favor of the present plaintiff and against Tuttle, and afterward on the 26th day of the same month judgment was rendered in favor of Tuttle.

The only question is, whether upon these facts there was a debt due from the town to Tuttle on the 13th of September, 1883, within the meaning of the term as used in our statutes concerning foreign attachment.

Although it must be conceded that the tendency both of legislation and of judicial decisions in this State has been to extend the scope of foreign attachment, yet we have discovered no inclination to pass beyond the line that separates claims for a breach of contract from those founded upon tort. To hold that the word "debt" as used in the statute concerning foreign attachment includes a right of action for a tort before it had become merged in a judgment, would be to transcend all rules for the construction of statutes, even the most liberal, and to do violence to the accepted legal meaning of the term.

In other jurisdictions it has long been considered well settled that the word "debt" as used in the law of garnishment (as the process is elsewhere usually termed), includes only legal debts, or causes of action for which debt or *assumpsit* may be maintained, but never includes claims for torts. Freeman Executions, §§ 162, 167; *Cook* v. *Walthall*, 20 Ala. 334; *Victor* v. *Hartford Fire Ins. Co.*, 33 Iowa, 210; *Foster* v. *Dudley*, 30 N. H. 463; *Getchell* v. *Chase*, 37 N. H. 106.

In the case under consideration the plaintiff's counsel during the argument virtually conceded the above principle as applicable to the claim of Tuttle at any time prior to the default, but earnestly contended that as the default acknowledged Tuttle's right to recover nominal damages, the claim thereby became a debt. But the office of a default is not to change in the least the nature of the demand in suit, but merely to dispense with the necessity of certain proof. It would be strange if a tort could be changed in its nature merely by being confessed. No action whatever will lie upon the default,

but the right of action for the original tort remains through all the proceedings in court until merged in a judgment, and then it becomes a debt.

The authorities go so far as to hold that in actions of tort, even where the damages have been actually liquidated by a verdict, there is no debt until judgment is rendered. *Thayer* v. *Southwick*, 8 Gray, 229; *Crouch* v. *Gridley*, 6 Hill, 250; *Kellogg* v. *Schuyler*, 2 Denio, 73.

In *Thayer* v. *Southwick*, above cited, Southwick had brought an action of tort against the city of Boston, and on the 20th of April, 1854, obtained a verdict in his favor against the city for $12,000 and costs, but no judgment was rendered on the verdict till the 8th of May following; and after verdict and before judgment, namely, on the 29th of April, 1854, the writ was served on the city as trustee of Southwick, who had obtained his verdict. SHAW, C. J., in delivering the opinion of the court, said: "The original cause of action did not render the city liable as trustee, because it is a cause of action arising from tort. The verdict did not convert it into a debt; no action would lie on it. It could not constitute a debt till judgment should be rendered on it. * * * The city owed the principal nothing when the trustee writ was served on them."

There was error in the judgment complained of and it is reversed.

Judgment reversed.

The other judges concurred.

GRAVES v. ATWOOD.

(52 Conn. 512.)

Deed — reservation — repugnancy.

A warranty deed was conditioned for a reservation of all the grantor's right, title and interest for his life. *Held*, a valid reservation.

ACTION to recover land. The opinion states the case. The defendant had judgment.

H. B. Graves and *J. Huntington*, for appellant.

W. Cothren and *W. H. Williams*, for appellee.

LOOMIS, J. The plaintiff complains that the defendant wrongfully dispossessed him, and continues to keep him out of the possession of several pieces ot land situated in the town of Woodbury. He asked for restoration of possession and for the rents and profits. The Superior Court having rendered judgment against him, he appealed.

On the 17th day of March, 1868, Warner Atwood of Woodbury, the owner and possessor of these pieces of land conveyed all of them to his son, Noble Atwood, by a duly executed deed containing the usual covenants of warranty and seisin, together with this clause, namely: "The condition of this deed is such that I hereby reserve all my right, title and interest in the aforesaid described pieces of land, with all the buildings thereon standing, during my natural life." He retained possession until his death, which occurred on August 15, 1871. On the day of the execution of the deed he also made a voluntary conveyance of all his farming tools to his son. He was then indebted to the amount of about $1,800, but had to his credit in a saving bank in this State the sum of about $3,000. Subsequently he made a voluntary transfer of this to the defendant, the wife of Noble Atwood, and at the time of his death was without property. On October 7, 1871, Noble Atwood conveyed said pieces of land to Fannie E. Hawley. On November 9, 1871, the latter conveyed them to the defendant. These deeds were without consideration, and were executed for the sole purpose of passing the title from Noble Atwood to his wife. The latter was in possession of the lands at the commencement of this action.

Upon the death of Warner Atwood, intestate, the Court of Probate for the district of Woodbury duly granted administration on his estate. Upon proceedings properly had and in obedience to the order of the Court of Probate, on June 8, 1882, the administrators sold the lands in controversy to the plaintiff at public auction, and on the same day executed and delivered to him a deed thereof. Upon this rests his claim.

It is the contention of the plaintiff in his brief, first, that the deed from Warner Atwood to his son was a nullity because of the above recited condition; secondly, that if otherwise good, it is fraudulent and void as against creditors.

We cannot accede to these propositions. The deed is from a father to his son, executed, as it is found, after an understanding between them that the son should provide and care for the father

during life. It is therefore quite certain that the father intended to accomplish some result—to grant something; and of course it is the duty of the court to give effect to his intent, if lawful, and if the language used to express it is legally sufficient for the purpose; and we can have no difficulty in seeing that he intended to pass the fee of the land at once to the son subject to a use for life. His words are "give, grant, bargain, sell and confirm;" and he binds himself by the covenants of warranty and seisin which form a part of the warranty deed in common use in this State. And the condition, read in the light of the grant, is to be interpreted as the reservation of the same measure of use thereafter as tenant for life, as he had theretofore enjoyed as owner.

In *Webster* v. *Webster*, 33 N. H. 18, the court had before it a deed by which a father conveyed to his son land in fee simple, with the usual covenants of warranty, and this reservation, namely: "Reserving all the right, title and interest in and unto the above-named land and buildings for and during my natural life." The father subsequently began to cut and carry away timber, and the son brought an action for waste. Of course he did not claim that the reservation nullified the grant, only that it did not protect his father from impeachment for waste. Speaking upon this latter point the court said that when the father "reserved in his deed all his right, title and interest in and to the lands and buildings conveyed, he employed the usual and proper words to reserve the land itself for his life, and no inference can be drawn from the language of the deed that any thing more than a life estate was understood or intended to be reserved."

Again the grantor, upon good consideration, gave, granted, bargained, sold and confirmed the lands to be held by the grantee, his heirs and assigns forever, and he bound himself, his heirs, and his executors and administrators, by covenant of warranty and seisin, using full and apt words whereby to empty himself of all title. If upon such a grant he had grafted, as the plaintiff insists that he did, a condition which utterly destroyed it, and left the unincumbered fee simple in himself, the grant and the condition being impossible together, the law unwilling to declare the whole a nullity, says that in the words of the grant is embodied his true intent and that these shall stand rather than those of the repugnant condition.

In *Ward* v. *Ward*, 1 Martin (N. C.), 28, a deed conveyed an estate absolutely, but in the premises, though not in the *habendum*, there

was an exception of the grantor's life-time in any part or parcel of the land, and it was held that the fee passed immediately to the grantee, and the reservation was void. In the case of *In re Young*, 11 R. I. 636, a father executed a warranty deed of land to his son, his heirs and assigns forever. Then followed a covenant of ownership and of general warranty; subsequent to these a reservation of the right and privilege for those who should be appointed to settle the grantor's affairs after his decease, to cut off and sell wood if necessary for payment of debts, etc. Held, that it was void as an exception, because repugnant to the grant. In 2 Cruise's Digest, part 7, tit. 13, chap. 1, § 22, a lease was to husband and wife and their son, with a proviso that if the son should demand any profits of the lands or enter into the same during the life either of his father or mother, then the estate limited to him should be utterly void; held, that this condition was utterly void, for it was contrary to the estate limited before. In Sheppard's Touchstone, 131, it is said that "if a feoffment be made of land in fee, on condition that the feoffee shall not enjoy the land, * * * the condition is void as repugnant to the estate." In 4 Kent Comm. 131, it is said that "conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience."

[Minor matters omitted.]

There is no error in the judgment complained of.

The other judges concurred.

NORTHROP v. KNOWLES.

(22 Conn. 522.)

Marriage — evidence — of unlawful cohabitation.

A formal marriage being proved, evidence that the cohabitation was reputed to be unlawful is incompetent.

ACTION to recover land. The opinion states the case. The plaintiff had judgment below.

H. W. Taylor, for appellant.

L. D. Brewster, for appellee.

LOOMIS, J. The record shows that upon the trial of this case the plaintiff claimed title to the land in question under the will of Friend G. Northrop, which was the subject of construction by this court in *Turrill* v. *Northrop*, 51 Conn. 33.

The plaintiff's title depended on the question whether he was the legitimate son of Gad G. Northrop, and his wife, whose maiden name was Cordelia Dennis. The plaintiff in chief offered direct proof of the marriage of Gad Northrop and Cordelia Dennis, including the testimony of Cordelia and what purported to be the certificate of the magistrate performing the marriage ceremony, and at no stage of the trial did he offer any evidence of reputation to prove the marriage. But the defendant, on his part, to disprove the marriage and to show that the plaintiff was illegitimate, offered the testimony of Harriet Curtis and others, that after the alleged marriage the said Gad and Cordelia were reputed in the neighborhood and locality where they resided to be unmarried, and that they were reputed to be not husband and wife, but to be living in a state of illicit intercourse.

The first question for review is whether this evidence of reputation was properly excluded by the court upon the plaintiff's objection.

We have no doubt it was. The plaintiff's case on this point rested solely upon direct evidence of a formal ceremonial solemnization of marriage between his parents at a specified time and place, and it is too obvious to require discussion that such evidence could not in the least be affected by any amount of evidence that they were reputed to have been unmarried. The strongest objection ever made against hearsay evidence would apply to such a case as this, for if the defendant's position is correct, a marriage solemnized according to all the forms of law might in effect be nullified by the mere speech of people.

The reasoning in behalf of the defendant is based upon the fallacy that because general reputation of parties as husband and wife, in connection with other circumstances, is admissible to prove marriage, therefore general reputation must also be admissible to prove that there was no marriage; but there is a vast difference between reputation as primary proof of an existing fact or relation and reputation as applied to prove a mere negative. Reputation in connection with other things is admissible to prove marriage, because among other reasons it attends and indicates the reality, as a shadow does the substance, but a non-existing thing casts no shadow.

But it may be suggested that in this case the evidence was offered to prove, not simply a negative, but an adulterous relation. This again overlooks another fundamental reason why reputation and cohabitation furnish presumptive evidence of marriage, which is, that the law presumes against vice and immorality and in favor of marriage. The contention of the defendant would revolutionize this wholesome principle and obliterate all distinction between vice and virtue, concubinage and marriage, as furnishing the basis for presumption.

But it may be asked, has reputation no office as tending to disprove marriage? Not where an actual, ceremonial marriage is relied upon, as in this case.

But where marriage is attempted to be established by reputation we think the defendant might be allowed to weaken the evidence by showing that the reputation was not general but was divided, but even in such case the authorities restrain the negative evidence within narrow limits. In *Badger* v. *Badger*, 88 N. Y. 547; s. c., 42 Am. Rep. 263, the action was for the admeasurement of dower, and the plaintiff's right depended on the fact of marriage with the deceased. The plaintiff's evidence showed long continued cohabitation, characterized by reputation and conduct to show that it was matrimonial. But it seemed that the deceased lived two lives. The cohabitation was under an assumed name. At the same time the deceased among his own friends and relatives, known by his true name, occupied rooms and lived as a bachelor. It was held error in the court below to permit evidence to show that the deceased was reputed a bachelor among his friends and relatives, as it did not explain or show the character of the cohabitation.

And this suggests another principle which is also decisive of the question under discussion. Reputation of adulterous relations is not admissible as primary proof, but only as subsidiary, or in aid of and incidental to substantive proof, where it may explain or account for the conduct of parties toward each other. This proposition is established by the following authorities. *Marble* v. *Marble*, 36 Mich. 386; *Clement* v. *Kimball*, 98 Mass. 536; Whart. Ev., § 255.

[Minor matters omitted.]

There was no error in the judgment complained of.

The other judges concurred.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

BOISSEAU v. BOISSEAU.

(79 Va. 73.)

Guardian and ward — conversion of personalty into realty.

A guardian may not convert his ward's personal estate into real estate without the previous sanction of the court, and the vendor may not enforce a lien.

SUIT to enforce vendor's lien. The opinion states the case.

Green & Miller, for appellant.

Withers & Barksdale, for appellees.

HINTON, J. It appears by the record of this case that William E. Boisseau qualified in the year 1876, as guardian of the infant children of George W. Davis, deceased, and as such guardian, received the sum of $800 from the proceeds of their father's life insurance; and that this sum constituted the whole estate of these infants at that time. That on the 1st of June, 1877, the said guardian purchased of one P. H. Boisseau a certain house and lot in the town of Danville, Va., at the price of $1,500; that this purchase was made by the guardian at the instance of the mother of the infant children, who were his wards, upon the understanding

that the mother would rent out the property and pay the deferred installments from the rent, but that instead of doing so, the mother and the children have occupied the same continuously from the time of the purchase; that the guardian, the said William E. Boisseau, paid the cash payment of $750 on the said property, out of the $800 of life insurance money mentioned above; that for the residue he gave his three bonds for $250 each, carrying interest at the rate of eight per centum per annum, maturing at one, two and three years, respectively, after date, and that these bonds were secured by a vendor's lien, expressly reserved on the face of the deed. And that the said William E. Boisseau is styled in both deed and bonds as guardian of William Henry Davis, George James Thomas Davis, Carry Eugene Davis and Mary Mabel Davis, infant children of George W. Davis, deceased. None of the deferred installments had been paid up to February, 1882, when the appellant filed his bill in the Corporation Court of Danville, praying a sale of said house and lot to satisfy his vendor's lien and for general relief.

On the 4th day of August, 1882, the decree appealed from was rendered, in which the court held, that the purchase of the aforesaid house and lot by William E. Boisseau, guardian, was a breach of his trust as guardian, and that the vendor, P. H. Boisseau, was equally responsible therefor, and adjudged the purchase to be null and void, and decreed that the said P. H. Boisseau should, within sixty days, return to the infant defendants, or their guardian, the said $750 with interest from the 1st July, 1877, or in default thereof the property should be sold.

Mr. Schouler in his work on Domestic Relations, at page 466, says, "conversions, that is to say changes made in the character of trust property from personal into real, or real into personal, are never favored. The previous sanction of chancery should always be sought, and this is only given under strong circumstances of propriety. The same may be said of exchanges of the ward's property. * * * The guardian must not buy land with the infant's money without the direction of chancery."

In 2 Kent Com., at marginal page 230, that distinguished author says, "the guardian must not convert the personal estate into real, or buy land with the infant's money without the direction of the Court of Chancery. The power resides in that court to change the property of infants from real into personal, and from personal into real, whenever it appears to be manifestly for the infant's benefit."

And Perry in his book states the condition of the law in England and the United States, as follows: "In England trustees or guardians are not ordinarily permitted to change the nature of the infant's property by converting personalty into realty, or *vice versa*, as where the trustees of an infant had saved £3,000 out of the profits of real estate, and laid it out in lands adjoining the infant's estate, with the consent of the guardian, and the infant died under age, the trustees were held not justified in making such an investment, and were ordered to account to the infant's executors. The rule originated in the fact, that formerly an infant at seventeen might make a will of personalty, and to convert his personalty into real estate took away a power that the law gave him; on the other hand, to convert his real estate into personalty gave him a power contrary to the policy of the law. The reason ceased with the statute of wills, which takes away the rights of infants to make wills, either of real or personal estate before they are twenty-one. Lord ELDON seemed to think that the rule was established for the protection of the relative interest of the real and personal representatives of the infant, but it is now established that the court will not regard the interests of an infant's representatives, nor interfere to protect them, but will look to the best interest of the infant. There seems now to be no principle at the bottom of the rule, and therefore it has been said in some cases, that where the advantage or convenience of the infants called for a change in the nature of the property, the court would order it. In other and later cases the jurisdiction and power of the court to change the nature of an infant's property have been denied; and it seems now to be the established rule that such change cannot be made even for the advantage of the infant.

"In the United States a guardian or trustee cannot convert an infant's personalty into real estate. If such conversion is made, the ward, on coming of age, may elect to receive their personal property, and the trustee or guardian must account and pay over to them. * * * * * * * * * * *

"And a trustee or guardian should not venture to expend the ward's personalty in making permanent improvements on the ward's land without first obtaining the sanction of the court; for if an unauthorized act is first done, the court will not sanction it, though in the particular case it might be proper, if first sanctioned by the court; for the principle is, that trustees and guardians should take no important step without leave of the court, and the court will

punish such action taken on their own responsibility, by refusing to sanction the expenditures." 2 Perry Trusts (3d ed.), §§ 605, 606.

Now the undoubted rule being, as may be seen from the above citations, that guardians have no right to convert the personalty of their wards into realty without the sanction of a Court of Chancery first obtained, it follows that the guardian, Wm. E. Boisseau, was guilty of a palpable breach of trust in making the purchase of the house and lot in question with the money of his wards, and in undertaking to secure the payment of the balance of the purchase-money, with interest, at the rate of eight per centum thereon, with the said house and lot. And it being also perfectly plain from the record, that the vendor, P. H. Boisseau, knew that he was dealing with Wm. E. Boisseau, as guardian, and that it was the money of the infants, that he was receiving from the guardian, he must be held equally liable with the guardian for the said breach of trust. For it has been long settled that whenever a fiduciary does any act in violation of his duty or commits a breach of trust, that he and all who willfully and knowingly aid him in the execution of these purposes are in the eyes of the law, participators in the offense, and all stand upon the same footing. *Fisher* v. *Bassett*, 9 Leigh, 119; s. c., 33 Am. Dec. 237; *Jackson* v. *Updegraffe*, 1 Rob. 107; *Pinckard* v. *Woods*, 8 Gratt. 140; *Jones* v. *Clarke*, 25 Gratt. 658; *Asberry* v. *Asberry*, 33 Gratt. 463.

Ordinarily where a fiduciary is acting seemingly in the discharge of his duties and there are no circumstances to indicate that the trustee or guardian, as the case may be, is exceeding his authority or violating his trust, third persons may deal with him, without inquiring whether or not the exigencies of the trust require him to dispose of the trust subject; but such is not the case when the fiduciary does not dispose of the trust subject in pursuance of the trust, but in violation of it, and the person with whom he deals, knowing this fact, aids him in the execution of his purpose, as in this case, by contracting with him.

The transaction in this case spoke for itself, and showed the vendor as plainly as it was possible for any thing to do, that it was illegal, and that the guardian was not acting in pursuance of his trust, but in violation of it. In *Broadus* v. *Rosson*, 3 Leigh, 25, TUCKER, P., speaking for the court, said: "Where he, the vendor, is aware that he is receiving payment out of a fund which the law will not permit to be encroached upon without an order of the court

I think he stands on no more advantageous ground than the guardian himself." And in *Asberry* v. *Asberry*, 33 Gratt. 470, this court held, that as Evans knew that the guardian was using the ward's money in paying his own debt, therefore he knew, or must be held to know, that the guardian was thereby misapplying the funds and committing a breach of trust. In that case the learned judge who delivered the opinion of the court, said: "The learned counsel says that Evans acted in entire good faith, without a suspicion of any thing improper in the transaction. It may be so. It is wholly immaterial. The law stamps the transaction as fraudulent, however innocent the intention of the parties, not actual fraud in this case, but fraud in law arising from a misapplication of trust funds. And this is what is meant by the learned judge of the Circuit Court in saying it was a collusive transaction." Viewing the fact of this case in the light of these principles, I cannot but regard this case as one in which both the guardian and the vendor must be held to have participated in an improper application of the funds belonging to these infants.

As to the objection that the decree does not require the commissioner of sale to give bond and security, before he collects the money, it is sufficient to say that when he is authorized to collect the purchase-money, it will be proper to provide in the decree that he shall give such before he receives any money under the decree. *Hess* v. *Rader*, 26 Gratt. 746; *McAllister* v. *Bodkin*, 76 Va. 814.

For these reasons I am of opinion to affirm the decree of the said Corporation Court of the town of Danville.

Decree affirmed.

Richmond, F. & P. Railroad Company v. Ashby.

(79 Va. 130.)

Railroad — ticket for station at which train does not stop — right to ride to intermediate station.

A railway passenger, with a ticket for a station at which the train does not stop, has the right to ride to an intermediate station at which it does stop.

TRESPASS on the case. The opinion states the case. The plaintiff had judgment below.

H. R. Garden, for plaintiff in error.

W. H. Payne, for defendant in error.

LACY, J. Robert Ashby, the defendant in error, and the plaintiff in the Circuit Court, brought this suit in the Circuit Court of Prince William county on the 14th day of August, 1877, against the Richmond, Fredericksburg and Potomac Railroad Company, alleging that the defendant company, running its cars on the track of its road in the said county between Quantico and Richland, two stations upon the said road in the said county for an agreed price, undertook to carry the said plaintiff as a passenger upon the said railroad from Quantico to Richland, and issued to the plaintiff a ticket in accordance with the said agreement or undertaking of the said company. That after entering the said company's railroad train at Quantico, and before reaching the station at Richland, the defendant, without lawful authority, with force and arms ejected the said plaintiff from the said railroad cars of the company; that the plaintiff was sick at the time with malarial fever; that the sickness of the plaintiff was thus aggravated, and increased suffering and great pecuniary loss were thus caused to the plaintiff. The defendant company pleaded not guilty and *non assumpsit*, upon which issue being joined, the jury found for the plaintiff and assessed his damages at $500. The defendant moved the court to set aside the said verdict and grant a new trial; which motion the court overruled, and entered judgment for the plaintiff accordingly.

Whereupon the defendant company excepted and applied to this court for a writ of error and *supersedeas*, which was awarded on the 2d day of July, 1880; by one of the judges of this court.

The evidence shows that in October, 1876, the plaintiff, being employed and engaged in getting lumber on Aquia creek in the county of Stafford, and being then a resident two and one-half miles from Quantico, was instructed by his employer to go to Aquia and have a schooner loaded with lumber to be shipped to the city of Philadelphia. That the said plaintiff had to return to Brooke's station near the mouth of Aquia creek, and his employer gave him a railroad ticket from Quantico to that point, which was produced to the court, and upon which was printed, "Richmond, Fredericksburg and Potomac Railroad Company, from Quantico to Brooke's station," and upon which was written, "October 23, 1876," and no

signature was appended thereto. But said ticket was duly stamped and pierced by the agent who sold it. That the plaintiff got on the train of the said company at Quantico, in the afternoon of the day. That the defendant's conductor made no objection to the said ticket but told him the train did not stop at Brooke's station. The plaintiff then told the said conductor that he knew that, but that he wanted to get off at Richland at which the train did stop, and which was some miles this side of Brooke's station. That the conductor told him that he could not so travel on that train and that he must get off; did not explain why; but told him if he did not get off he would put him off. That the conductor was peremptory and came into the car with another hand; the plaintiff being in no condition to resist, when the train drew up at Chappawamsie drawbridge, about three miles from Richland, finding that he would be put off at that point, to avoid insult and violence, which were about to be used, he got off. He was sick with malarial fever, and had to walk to Richland, reaching there about dark in a cold drizzling rain and eastern storm; was taken sick again from this exposure and hardship. That he did not get the schooner loaded for that reason, the vessel was frozen up, the lumber rotted, and he lost his employment, etc.

There were only six passengers on this train, and it stopped that day at Richland, after the plaintiff had been put off. The plaintiff told the conductor he was sick, and asked him, as he had only four miles to run to his stopping-place, not to put him off in a swamp, that it was a low, flat marsh, and the nearest house was a mile and one-half off. When this train got to Richland that evening the said conductor stopped and got off, and boasted that he had just put a man off at the said bridge because he had a ticket that was not signed. No passenger got off at Richland that evening, and the train stopped without being flagged. It is admitted by the company that the ticket was good, but not for the train in question, that being an express train which did not stop at Brooke's station.

There is no pretense that the company, or its agents, told the plaintiff not to get on the train in question, or gave him any warning whatever concerning the same when the ticket was sold to him.

Passengers who are being lawfully carried in public conveyances have thrown around them the best protection which the law can afford them, in the high degree of responsibility for care and diligence which the law imposes upon the carrier.

A passenger's ticket is both a receipt and a contract. It is the acknowledgment of the receipt of the passenger's fare and the obligation to carry him for the purposes and upon the terms specified.

Such tickets are of universal use in railroad travel, and almost every question which can arise concerning the use of such tickets, the rights of the passenger under them, and the duties of the carrier concerning them, has been often the subject of judicial investigation and decision in the courts. The duties of the conductors and the corresponding responsibilities of the carrier have been often considered and passed upon, and where by a regulation of the company the conductor has been required to do any act, the conductor has been held excusable, while the company has been held responsible for resulting injury. And so, when the passenger had paid for and obtained, as he supposed, a ticket which entitled him to his passage to his destination, but which by a mistake of the company's agent from whom it was purchased only entitled him to be carried to a point short of such destination, and after he had been carried beyond the place designated in the ticket, and before reaching that to which he had really contracted and paid to be carried, he was ejected because the ticket did not entitle him to be carried further, it was held that the conductor had performed his duty, and that as between him and the passenger the ticket was conclusive, but that the company was liable to him for damages for the eviction, by reason of the mistake of its ticket agent. *Frederick* v. *Railroad*, 37 Mich. 342; s. c., 26 Am. Rep. 531; see also *Bennett* v. *Railroad*, 5 Hun, 599*; *Downs* v. *Railroad*, 36 Conn. 287; *Shelton* v. *Railroad*, 29 Ohio St. 214.

It is true that if the ticket is used it must be used as an entirety; that is, a passenger cannot use a ticket for a part of the journey one day or at one time, and then at another time use the same ticket for the residue of the stipulated journey, contrary to the company's regulations. And it may be conceded also that the company has a right to make such regulations as may appear right as to the running of its trains and the points along the route at which the same are to stop. But the company has no right to sell a passenger a ticket for a particular station and then refuse to stop at that station; and the act of the ticket agent in selling such ticket to a passenger is the act of the company, and if the conductor refuse to allow the passenger to disembark at such station for which

* Affirmed, 69 N. Y. 594; s. c., 25 Am. Rep. 250.

he holds a ticket, if he obeys the company's regulation, he is exonerated, but the company is responsible for the act of the agent who sold the ticket and wrongfully received the money for it. So it may be conceded that if a passenger buys a ticket which is not good on a certain train and he insists on riding on that train, he is not riding under his contract, which was that he might ride on other trains. *Dietrick* v. *Penn. R. Co.*, 71 Penn. St. 432; s. c., 10 Am. Rep. 711, and other cases there cited.

And also it has been decided, as we have stated above, that if a passenger bought a ticket between two points, and the train was not allowed by the company's regulations to stop at the named destination, and he made a mistake in the use of the ticket which was not induced by the company, the company would not be responsible if he was carried beyond his destination, when the conductor told him the train did not stop at the named destination. *Pittsburgh, Cin. and St. Louis Ry. Co.* v. *Nuzum*, 50 Ind. 141; s. c., 19 Am. Rep. 703.

But if under such circumstances the conductor had forcibly ejected the passenger from the train before he had reached his stated destination, it would not appear to be within the scope of that decision and others cited as supporting it.

But in the case at bar, the questions involved do not seem to have passed under review in any case to which we have been referred, or to any which have come under our inspection. Such a case as this cannot occur often on any well-regulated railroad; and this case must be considered and decided upon its own peculiar circumstances.

The passenger, just before the arrival of a railroad train, applies for and buys, for an agreed price, a ticket to a particular destination or designated station. He does not insist on stopping the train at any place not named in the schedule, or at which, by the company's rules, it is forbidden to stop; nor does he insist on riding beyond the point to which he has paid to be carried, but requests only to be allowed to ride to a station at which that train must stop under the company's regulations, and which is not beyond the named station, but which is reached before the named station is reached. The company after selling him his ticket, and receiving the agreed price of the same, not only refuses to recognize it according to its terms as contrary to its regulations for that train, but refuses to allow him to use it for a shorter distance, and stops

the train in a low swamp in the afternoon, when night is coming on, with no habitation near, and puts this sick man off in the midst of a drizzling rain in an eastern blow or north-eastern storm, exposure to which upon our shores is so fraught with sickness and suffering. And what reason was there for this other than such as appears wanton and cruel? The company could not have been injured by his remaining on the train to the station at which the train stopped, four miles beyond; nor could the company nor its officers have been in any degree inconvenienced thereby. The train was not crowded, only six passengers therein, the distance short, and less than he had paid to travel.

Can it be considered that this company can justify this harsh treatment upon one of its passengers? The carrier's duty is to carry his passenger safely and properly and respectfully, and if he intrusts this duty to his servants, the law holds the carrier responsible for the manner in which they execute the trust. In a case like this the carrier is not only responsible for the actual injury which the passenger sustained from the ill-treatment of the servant, but it is a proper case for exemplary damages. In this case the jury assessed the damages of the plaintiff at $500, and the court is asked to set aside the verdict as excessive. The jury was controlled doubtless by the peculiar circumstances of the case, and when they are considered, they do not seem to have acted in any exaggerated manner in coming to their conclusions. The verdict does not appear either unjustifiable or excessive. The jury was the proper trier of the fact, and the Circuit Court did not err in refusing to disturb the verdict.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and the same must be affirmed.

Judgment affirmed.

LOUTHAN v. COMMONWEALTH.

(79 Va. 196.)

Constitutional law — right to electioneer.

A statute forbidding judges and State school officers to electioneer is invalid.

CONVICTION of misdemeanor, for violation of an act, entitled "An act to prohibit the active participation in politics of certain officers of the State government," the first and second sections of which are as follows:

"§ 1. It shall not be lawful for the judge of any court, the superintendent of public instruction, any superintendent of schools, the superintendent, manager or any employee of any asylum, or State institution of learning, actively to induce or procure, either directly or indirectly, or to attempt either directly or indirectly to induce or procure any qualified elector to vote in any election for any particular candidate, or in favor of any particular political party, or to vote against any particular candidate or against any particular party.

"§ 2. It shall not be lawful for any of the officers or employees mentioned in the foregoing section to participate actively in politics, and making political speeches, or the active or official participation in political meetings, shall be deemed to be an active participation in politics within the meaning of this section."

R. T. Hubard, and *A. A. McDonald*, for plaintiff in error.

F. S. Blair, attorney-general, for Commonwealth.

LACY, J. It is not necessary to notice the various defenses set up to the prosecution. The main defense relied on by the plaintiff in error, if not the only one, is that this act of the legislature is in violation of the Constitution of the United States and of the State of Virginia. If the act of the legislature, set forth above, is in violation either of the Constitution of the United States or of the Constitution of the State of Virginia, then the Constitution infringed shall rather prevail than the act of the legislature which infringes it. The superior law must prevail, and the inferior law must give way before the superior law. And when a court is called

upon to enforce the inferior law, or the superior law with which it is in conflict, if they are so opposed that both cannot be enforced, but if one is enforced then the other is invalidated, the inferior law must be disregarded and the superior law must be enforced. Being in conflict, both cannot be enforced and the superior law must govern, the inferior law to the contrary notwithstanding. The court cannot refuse obedience to the mandates of the Constitution. The legislature is called into existence by the Constitution, and its powers are restrained and limited by the Constitution. The legislature cannot alter, amend or modify the Constitution. The Constitution, in all its provisions, is beyond the reach of any legislative enactment, however seemingly wise and beneficent its provisions. It is always with reluctance and never in a doubtful case, that the court will set aside and decline to enforce an act of the legislature. As has been often remarked in this court, the legislature is endowed by the Constitution with the legislative power of this Commonwealth. It does not possess only granted but supreme power in the exercise of legislative powers limited and restrained only by the express terms of the Constitution, or the necessary implications therefrom. It will be admitted that the acts complained of in this indictment are not in themselves wrong. If our government is a government by the people, to seek active participation in the government is the plain privilege of every citizen. It is not only the privilege but it might reasonably be held to be the plain duty of all the people, and this will not be denied as an original proposition, true in itself.

But that this principle is recognized in the charter of our liberties, in the Constitution of the United States and in the Constitution of Virginia, is equally clear. Under the Constitution of the United States, Congress is forbidden to pass any law respecting an establishment of religion, or prohibiting the full exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the government for a redress of grievances.

Under the Constitution of Virginia, the legislature is forbidden in express terms from putting any restraint upon the freedom of the press, or the freedom of the citizens to freely speak, write and publish his sentiments on all subjects, for that instrument declares: "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments,

and any citizen may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Art. I, § 14, Const. of Va.

And again: "All citizens of the State are hereby declared to possess equal civil and political rights and public privileges." Art. I, § 20, Const. of Va.

And again, when prescribing the powers and duties of the legislature, the Constitution in terms forbids the legislature from abridging the freedom of speech, declaring: "The general assembly shall not pass any law abridging the freedom of speech or of the press." Art. V, § 14, Const. of Va. Thus we find freedom of speech and protection to the equal political rights of all the people deeply imbedded in the fundamental principles of our government.

And not content with the most solemn declaration of principles, an impregnable barrier is erected before them in this last quoted unmistakable limitation upon the legislative power; and the legislature is deprived of the power to abridge the freedom of speech of any citizen; it takes its existence and its powers, absolutely deprived of this power. And then the Constitution covers this inalienable right of the citizen with a shield which confronts every legislature which can ever have any existence under the Constitution, with an oath of office which records its fealty to the Constitution before it can either enact laws or have any existence. And in every department of the government this safeguard is not forgotten, but is kept steadily in view to maintain all its provisions sacred as the years pass. We have ventured to say that none will be found in the limits of this Commonwealth to deny to the citizen these inalienable rights.

It is admitted also that Carter M. Louthan is a citizen of Virginia, and that he has never in any wise abused this inestimable privilege guaranteed to all her citizens by the State in her organic law. It is admitted that the said plaintiff in error has committed no excess in the exercise of his rights of citizenship, it is only alleged that he did peaceably assemble together with his fellow-citizens, and did advocate a certain set of electors for president and vice-president of the United States at the coming election in November next. For this he has been indicted by a grand jury in the city of Richmond, tried for it and convicted, and sentenced to be punished. Now why may not Carter M. Louthan do these acts, in themselves so harmless, and under the supreme law of this land

so entirely lawful? We have already seen the act in question which has declared the exercise of these constitutional rights a crime. What is it that makes the exercise of these rights of the citizen by this citizen a crime? That he has been appointed to and holds the office of county superintendent of schools in the county of Clarke. It is contended by the Commonwealth that because he is the incumbent of this office, the legislature, in the exercise of its general powers, may impose upon him such conditions, such restrictions as to it may seem for the public good. The learned attorney-general has presented before this court the case on the side of the prosecution; and he contends first, that the plaintiff in error, being an officer appointed by the State board of education, does not come within the provisions of the Constitution already recited; in other words, that being an officer, he is not a citizen within the contemplation of the Constitution; that the legislature has the right to exclude the officers of the State government from incompatible pursuits; that the legislature felt that the active participation in politics by school officials was an evil that should by restrained; and contends that the legislature has the power to make all needful laws and regulations to carry into effect the public free school system provided for by the Constitution; citing the case of *Ex parte Curtis*, 106 U. S. 371.

In that case the Supreme Court of the United States, in construing the act of Congress prohibiting the employees of the government, under penalty, from giving or receiving moneys for political purposes, held that act not to be unconstitutional. The act of Congress under consideration in that case provides "that all executive officers or employees of the United States, not appointed by the president with the advice and consent of the senate, are prohibited from requesting, giving to or receiving from any other officer or employee of the government any money or property, or other thing of value, for political purposes, and any such officer or employee who shall offend against the provisions of this section shall be at once discharged from the service of the United States, and he shall also be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in a sum not exceeding $500." Mr. Chief Justice WAITE, delivering the opinion of a majority of the court, said: "The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes, neither does it prohibit them alto-

gether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges." That the evident purpose of Congress in such enactments was to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service; that those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees.

That being so, that is, the political privileges of these officers and employees being unimpaired, the court held the act in question constitutional. It is clear from the opinion of the court in this case, that if the act in question had debarred the persons included therein from any political privilege, the court would have regarded it as a different question altogether. But the chief justice does not leave this matter to conjecture, but proceeds to show in a strong light, that the act in question was in effect an act to preserve and to protect the political privileges of the persons included in its provisions; that the effect of the act was to prevent oppression and to leave the employees of the government free to contribute or not to contribute, according to their own uncontrolled desire, to any political party, or to no political party, as a free inclination might suggest or dictate, and to protect such persons from being compelled to contribute their money in a manner contrary to their own wishes and sympathy.

He says: "A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor — to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect in some degree those in the public service against exactions through fear of personal loss," re-

ferring to the act of February 1, 1870, chap. 63, Rev. Stat. 1784, "To protect officials in public employ."

The court says further: "No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and employees provided for from being compelled to make contributions for such purposes through fear of dismissal, if they refused." And that "political parties must almost necessarily exist under a republican form of government, and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this."

This is the case of *Ex parte Curtis*, and we thus fully recited and considered it, because it is appealed to by the learned attorney-general to uphold the act of the legislature in this case, which as we have seen, forbids certain citizens and officers of the State government from taking part in political meetings and speaking their sentiments on political questions freely according to their own untrammelled desire.

The Supreme Court of the United States declared the act of Congress constitutional because it did not destroy but protected the political privileges of these employees of the government, and guaranteed to them the right as freely as all others in the country, to act on political questions according to their own desire, and support without control, and without let or hindrance, the political party which they preferred.

We cannot read that case and regard it as giving countenance to Congress, or to any other legislative body, to seal the lips of citizens, and exclude them from the assemblies of the people unless they will sit dumb among their fellow-men, and to forbid their holding communion with their fellow-citizens on governmental questions, to directly or indirectly influence the votes of others.

We think we can justly and fairly appeal to that decision of our supreme judicial tribunal as sustaining the view we have taken of this case.

There may have been a time in the history of our country when the nature of the government was less understood and less clearly defined, when this might have been an open and debatable question; but we cannot now so regard it.

In the early days of the republic, ambitious and despotic rulers,

seeking to perpetuate their power, or to aggrandise their stations, and finding no express prohibition in the organic law, passed laws placing restraints upon the political privileges of the people, and in 1798 passed the sedition act, which trammelled freedom of speech, and imposed penalties upon the free discussion of political questions. This brought on a conflict between the people and their rulers, which culminated in a change of rulers, and in the constitutional provisions, both Federal and State, which we have recited above, which guaranteed to the citizens of the United States and of the State of Virginia freedom of speech, and the right to peacefully assemble, to freely speak and freely write their sentiments on all subjects.

Virginia, ninety-six years ago, standing upon the threshold of the new Union, pausing before she joined hands with her sister States and pledged her faith to form a more perfect union, declared "that among other essential rights the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States."

And immediately upon the formation of the Union by the ratification of the Constitution, we find Congress proposing, and the States ratifying among others, the first amendment to the Federal Constitution embodying this declaration, which was thus set in its place in the national household, where in the future, as in the past, through all coming time, let us hope it may remain sacred in the eyes of the nation.

Virginia, as we have seen, has deeply written this principle upon her own constitutional tables of stone, and it cannot be violated by any department of her government. But it is contended that this act does not affect the citizens of Virginia, it only affects certain officeholders, and the legislature has the right to regulate the conduct of these. These officeholders could not be such if they were not citizens. The citizens of Virginia fill her offices. And as we have no privileged classes in this State, so we have no class of citizens outside of the protection of the Constitution. That the legislature may correct abuses in official conduct; that official malfeasance or misfeasance is liable to punishment none will deny; but there is no pretense of such in this case. The act is not entitled an act to correct official misconduct or the abuse of official station, but is entitled "An act to prohibit the active participation in politics of certain officers of the State government."

If the legislature has the power to forbid the exercise of one political privilege, why may it not forbid the exercise of another? If it may forbid one of the officers of the government to speak or write according to his sentiments on public affairs, why may it not forbid the officer from voting according to his sentiments, and why may it not impose other restrictions and other disqualifications, until the officer is driven from his office because of the exercise of his constitutional privileges? The officer in question is a constitutional officer, and while he may be removed from office for malfeasance, misfeasance, or gross neglect of official duty, or for sufficient cause, he cannot be removed for exercising any right guaranteed to him by the Constitution without violating that instrument. The Constitution provides the method of his removal, and the legislature cannot remove him in a different method, by creating a new offense and submitting the question of his removal to any other tribunal than that provided by the Constitution, the senate of the State. Far less can the legislature, in the exercise of its general powers, declare that to be a crime, which the Constitution has declared to be an inalienable right.

It is contended that the legislature has this right, as we have said, because this citizen is an officer of the government; that the constitutional provision applies to the citizens other than officers of the government. We do not so read the Constitution. These rights are guaranteed to all the citizens of the State, not to any portion or any class of citizens. And because a deserving man has been honored with the confidence of his fellow-men and elevated to a position of honor and trust, is no just cause for his political degradation, but the contrary.

We are of opinion that the act of the legislature in question is in violation of the Constitution of Virginia, is therefore null and void, and that the supposed offense for which Carter M. Louthan was indicted and tried is not a crime under our laws; and that the judgment complained of and appealed from must be reversed and annulled, and the prosecution against him dismissed.

Judgment reversed.

FAUNTLEROY and RICHARDSON, JJ., concurred; HINTON, J., reserved his opinion; LEWIS, P., dissented.

HARRISON v. COMMONWEALTH.

(79 Va. 374.)

Criminal law—homicide—evidence of dangerous character of deceased.

On a trial for murder, evidence of the dangerous character of the deceased is only admissible when a case of self-defense is shown,* and then it must be proved by reputation and not by the opinions of witnesses.

CONVICTION of murder. The opinion states the case.

W. S. Poague, for plaintiff in error.

F. S. Blair, attorney-general, for Commonwealth.

LACY, J. The statute provides that murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate or premeditated killing is murder of the first degree; and that murder of the first degree shall be punished with death. Murder has been defined to be the willful killing of any subject whatsoever, through malice aforethought. Lord Coke says: "Murder is when a man of sound memory and of the age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature, *in rerum naturæ* under the king's place, with malice aforethought either expressed by the party or implied by law, so as the party wounded or hurt die of the wound or hurt within a year and a day after the same." Lord Mansfield defined it thus: "Murder is when a man of sound sense unlawfully killeth another of malice aforethought, either express or implied. If the malice be express, the facts remain with the jury. If the malice is to arise from implication, it is a matter of law, the entire consideration of which resides with the court."

If a man is to be taken to intend what he does, or that which is the necessary and natural consequence of his own act, which cannot be denied, then the plaintiff in error, when he pointed a loaded pistol at the deceased, some eight or ten feet distant, which he had carefully inspected and manipulated a few seconds before, and fired the same with deliberate aim, twice, thus shooting and killing the deceased, he only carried out a formed purpose with deliberate execution. And if malice may be inferred from the deliberate use of

* See *Williams* v. *State* (14 Tex. Ct. App. 102), 46 Am. Rep. 237.

a deadly weapon in the absence of proof to the contrary, that then in this case the malicious intent seems to be established.

The plaintiff in error, as has been set forth, had a difficulty with the deceased on the 22d of November, in which he was slightly injured. On the 25th of the same month, after seeking him on the 23d, and threatening to kill him on sight, the plaintiff in error, being himself in nowise assaulted or attacked, approaches the deceased with a loaded pistol and challenges the deceased to a fair fight without weapons, which being declined upon the ground that the deceased was done with the fuss, he deliberately shoots the deceased and kills him. The deceased was practically unarmed, for while he held in his hand an axe, which he was using to chop wood, he made no hostile use of it, and was not close enough to strike the prisoner with it unless he had thrown it. It seems difficult to imagine a more deliberate killing.

But the plaintiff in error seeks to justify his act upon the plea of self-defense, alleging that the deceased was a person of a fussy and dangerous character, and adduces evidence to that effect. Another error assigned by him, is that a witness was not allowed to answer the question propounded by the prisoner, "Did you consider the deceased a person of dangerous character?"

It cannot be contended that the fact that the deceased was a dangerous character, and fussy and quarrelsome, would justify any person to kill him who should feel so inclined, without provocation or any cause of offense whatever. Evidence of the bad and dangerous character of the deceased has been held admissible, and properly so under some circumstances in many States of this country. If a case of self-defense is *prima facie* made out by the defendant on a trial for homicide, he has been held entitled to show that the deceased was a man of superior strength and of brutal and ferocious character. It has been so held in many of the States.

Lewallen v. *State*, 6 Tex. Ap. 475; *Hudson* v. *State*, 6 Tex. Ap. 565; *People* v. *Murray*, 10 Cal. 309; *State* v. *Jackson*, 33 La. Ann. 1087; *Shivey* v. *State*, 58 Miss. 858; *Rippey* v. *State*, 2 Head, 217; *Payne* v. *Commonwealth*, 1 Metc. (Ky.) 370; *Roberts* v. *State*, 68 Ala. 158; *Haynes* v. *State*, 17 Ga. 465; *State* v. *Smith*, 12 Rich. 430; *State* v. *Sackett*, 1 Hawks, 210; *State* v. *Keene*, 50 Mo. 357; *Davidson* v. *People*, 4 Colo. 145; *State* v. *Scott*, 24 Kans. 68; *State* v. *Dumphey*, 4 Minn. 438; *Com.* v. *Barnacle*, 134 Mass. 216; *State* v. *Nett*, 50 Wis. 524; *State* v. *Collins*, 32 Iowa, 36; *Brownell* v.

People, 38 Mich. 732; *State* v. *Hawley*, 4 Harr. 562; *Patterson* v. *State*, 66 Ind. 185; *Com.* v. *Zeibert*, Whart. Hom. 506.

While such evidence has been admitted in many cases where the prisoner had been assaulted, and when the defendant appeared to have been acting in self-defense in striking the fatal blow, yet it would be no palliation of an assault by the prisoner that the prisoner believed that the person attacked and killed by him was a dangerous person. And where no case of self-defense has been made out, it has been decided, in numerous cases, that such evidence was inadmissible. And in such a case, when the prisoner himself made an attack and killed his antagonist, without other danger to himself than such as he had himself deliberately sought by his own violent and unlawful conduct, such evidence is properly excluded. See *State* v. *Field*, 14 Me. 244; *People* v. *Lamb*, 2 Keyes, 364; *Eggler* v. *People*, 56 N. Y. 642; *State* v. *Hogue*, 6 Jones, N. C. (L.), 381; *State* v. *Dumphey*, 4 Minn. *supra*; *People* v. *Murray*, 10 Cal. *supra*.

In this case evidence of the dangerous character of the deceased was admitted by the court, and this was not an error of which the plaintiff in error can complain. Such evidence could only be admitted of the general reputation of the deceased in a proper case. That being matter of public notoriety, the prisoner is presumed to have had knowledge of it and to have been put in greater fear of his life being taken when assaulted by such a person, or of suffering serious bodily hurt. But it could not, upon any such ground, have been supposed that the opinion of a particular witness as to the dangerous character of the deceased could have been known to the defendant and have influenced his action. And the court did not err in excluding the question set forth in the first assignment of error here, and the said exception must be overruled.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and the same must be affirmed.

Judgment affirmed.

FOSTER v. JONES.

(79 Va. 642.)

Constitutional law — impairment of office.

Where a judge has been elected by the legislature, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although it diminishes his compensation.

MANDAMUS. The opinion states the case.

George P. Haw, for petitioner.

H. R. Pollard, for respondent.

HINTON, J. This is an application on the part of the Hon. John D. Foster to this court for a writ of peremptory *mandamus* to compel the restoration to the petitioner of the office of County judge of the county of King and Queen, which he claims is now usurped and withheld from him by the Hon. J. H. C. Jones. The petition sets out, that in January, 1880, the Hon. John D. Foster was elected and commissioned as judge of the counties of King and Queen and King William, which then formed what was known as district No. 41, and proceeded to discharge and was discharging the duties of his said office on the 7th day of February, 1884, when the said J. H. C. Jones, claiming that he had in January, 1884, been elected judge of the county of King and Queen by the general assembly of Virginia, took possession of the said office of County judge for the county of King and Queen, and refuses to render the same back to the petitioner. It then goes on to allege that the election by the general assembly of the said Jones to the office of County judge of King and Queen was unconstitutional; that his commission is illegal and void, and that he is not entitled to said office. To this the respondent answers: "That the general assembly of Virginia, by virtue of the power vested in it under the Constitution, passed an act, which was approved on the 18th day of January, 1884, to district the State for County judges, whereby the county of King William, which had been theretofore attached to the county of King and Queen, was separated from it, and designated as district No. 41, and entitled to a County judge, and the county of King

and Queen was designated as district No. 84, and entitled also to a County judge." The answer further says, that at the time of the redistricting the said Foster was a resident of the county of King William, and the county of King and Queen being without a County judge, he, the respondent, was thereupon regularly and properly elected judge of that county.

From this brief statement of the case, as disclosed in the pleadings, it will be readily seen that the real inquiry is, whether Judge FOSTER, notwithstanding the division of the district and his residence in the county of King William, is still judge of the county of King and Queen, and the answer to be given to this inquiry must depend upon the power of the legislature to curtail the territorial jurisdiction of a county judge after his election. The determination of this question in this case is freed of much of the difficulty which usually attends the decision of cases of this character, by the circumstance that the legislature has been careful, in making the division, to leave Judge FOSTER as judge of King William, the county in which he resides. *State* v. *Choate*, 11 Ohio, 511; *State* v. *Messmore*, 14 Wis. 170. We think it may fairly be assumed in the outset to be an undeniable proposition, that the two branches of the legislature, as the direct representatives of the people, have the right when no restrictions have been imposed upon them, either in express terms or by necessary implication by the Constitution, to create and abolish offices accordingly as they may regard them as necessary or superfluous. And that they may also, under like circumstances, deprive the officers of their salaries, either directly, by removing them from office, or indirectly, by so changing the organization of the departments to which they are attached as to leave them without a place. But of course this power in the legislature cannot be construed to extend to any of the various classes of offices which are known as constitutional officers; that is, to any of those officers whose tenure and term of office are fixed and defined by the Constitution. *State* v. *Messmore*, 14 Wis. 167; *Com.* v. *Gamble*, 62 Penn. St. 352.

Now it will be observed that the office of County judge is fixed by the Constitution, and the term of office is clearly defined in the same instrument. It is therefore a constitutional office, and the County judge is a constitutional officer. In passing upon any question, by the determination of which the rights of any such officer may be supposed to be affected, the courts must look to the Con-

stitution, and give to its provisions such a construction as will preserve to the officer his clearly defined constitutional rights, and yet shall not trench upon the inherent rights of the legislature, which should seldom be adjudged to have been surrendered in a doubtful case. Cooley Const. Lim. 173.

Section 13 of article VI of the Constitution of Virginia, reads as follows: "In each county of this Commonwealth there shall be a court called a County Court, which shall be held monthly by a judge learned in the law of the State, and to be known as the County Court judge, provided that counties containing less than eight thousand inhabitants shall be attached to adjoining counties for the formation of districts for County judges. County Court judges shall be chosen in the same manner as judges of the Circuit Courts. They shall hold their office for a term of six years, except the first term under this Constitution, which shall be three years, and during their continuance in office they shall reside in their respective counties or districts," etc.

From the mere reading of these provisions it will be seen that if it is not made the duty of the legislature to elect a County judge for each county of the Commonwealth, having a population of eight thousand inhabitants (upon which point we express no opinion), at least they are not prohibited from doing so whenever in their judgment it may be deemed expedient or proper.

Now as there is nothing in the Constitution which expressly or impliedly confers upon the County judge the right to a territorial jurisdiction over more than one county, where that county contains as many as eight thousand inhabitants, and as the legislature independently of any constitutional restrictions has the power to curtail the territorial jurisdiction of the County judge to a county having at least that number of inhabitants, it must follow that the legislature had the right in this case to separate the county of King William from the county of King and Queen, to which it had been theretofore attached (in consequence of having less than eight thousand inhabitants), and erect it into a separate district; the census of 1880 having, as is admitted, disclosed the fact that it then contained more than that number of inhabitants. It is argued however that if this be so, that then the legislature has the power, in contravention of the provision of section 22 of article VI of the Constitution, to diminish the salary of the County judge during his term of office. But this by no means follows. Judge FOSTER was

elected judge of judicial district No. 41. He is still judge of the only judicial district No. 41, of which we have any knowledge. It is true that the territorial limits of that district have been diminished. But he must be held to have accepted his commission subject to any change of this sort which the legislature might deem it expedient to make. His salary however has not been diminished. As a matter of fact, he does not and cannot receive the "additional compensation of $20 for every thousand inhabitants over ten thousand" which he received under the provisions of section 10 of chap. 183 of the acts of 1877–78, whilst he was judge of both counties. The words "salaries and allowances" as used in section 22 of art. VI of the Constitution, do not in our opinion, include the "additional compensation" provided for by this act. This compensation is a provision allowed by the legislature in addition to the salary of the judge. And it is by the very terms of the act made fluctuating and dependent upon the number of inhabitants a county or district may have in excess of ten thousand. Our conclusion is, that Judge FOSTER accepted his commission subject to the right of the legislature to divide his district, whenever within the limits of their constitutional powers they might deem it necessary; that he is not the County judge of the county of King and Queen, and is not entitled to a salary or compensation as judge of that county. The writ is therefore denied, the rule discharged and the petition dismissed.

Mandamus denied.

TOWN OF SUFFOLK v. PARKER.

(79 Va. 660.)

Municipal corporation — liability for nuisance.

A town is liable in damages for maintaining a market-house which is a nuisance. (*See note, p.* 643.)

ACTION of damages for nuisance. The opinion states the case. The plaintiff had judgment below.

R. R. Prentiss and *M. Briggs*, for plaintiff in error.

Causey & Rawls and *John Goode*, for defendant in error.

RICHARDSON, J. The plaintiff's declaration contains three counts, the material allegations in which are substantially the same.

Omitting the usual preliminary matter of inducement the declaration avers, that at the time of the alleged grievances thereinafter set forth, and thereafter until the commencement of this suit, the plaintiff was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being in said town of Suffolk, county of Nansemond, and State of Virginia, and in which said dwelling-house, with the appurtenances, the said plaintiff, at the time of the committing of the grievances complained of, inhabited and dwelled, and continued to inhabit and dwell therein until the bringing of this suit. And the said defendant, before and at the time of the committing of the grievances thereinafter complained of, was possessed of a certain market-place near the said dwelling-house, with the appurtenances of the said plaintiff, and by reason thereof the said defendant, before and at the time of the committing of the grievances by the said defendant, as thereinafter mentioned, ought to have hindered and prevented the noisome, noxious, offensive and unwholesome smells, vapors and stenches from proceeding and issuing from the said market-place, and ascending and coming unto and into the said premises of the said plaintiff; and the said defendant ought also to have hindered and prevented the large quantities of dead meat, carcasses, excrement and filth from remaining upon the said market-place, and from being thrown and cast upon the said premises of the said plaintiff. Nevertheless, the said defendant, well knowing the said last-mentioned premises, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff, and to incommode and annoy her in the possession, use, occupation and enjoyment of her said dwelling-house, with the appurtenances, theretofore, to-wit, on the day of , 188 , and all divers other days and times between that day and the commencement of this suit, wrongfully and unjustly suffered divers large quantities of dead meat, carcasses, excrement and filth to be thrown and cast upon the said premises of the said plaintiff; and also thereby divers noisome, noxious, offensive and unwholesome smells, vapors and stenches during the time aforesaid proceeded and issued from the said market-place and ascended and came unto and into the said premises of the said plaintiff; and on these several days and times, these greatly annoyed and incommoded the said plaintiff in her use and habitation of the said dwelling-house; and

also the said plaintiff hath been and is hindered and prevented from letting her said premises to a tenant in a beneficial manner, and that she has been thereby deprived of great gains and profits which she otherwise might and would have derived and acquired.

[Omitting other counts and minor discussion.]

The only direct evidence offered for the plaintiff is the testimony of the plaintiff herself. She testifies in substance that she was the owner in fee of the house and lot described in the declaration and immediately adjoining the market-house, in the town of Suffolk; that she had owned her lot about seven years, and that it cost her $1,000 with the mere shell of a house upon it; that she weather-boarded and painted the house, and plastered the whole inside of the building, and had fenced and repaired the property generally at a very considerable outlay. That at the time she purchased and improved her lot there was no market-house next her lot nor any talk about erecting one there. That since the erection of said market-house, up to the commencement of this suit, she had been subjected to a great and continuing nuisance. That the stench on her lot from the dead carcasses of fowls, which had been brought to market and died, and had been thrown over the fence on to her premises, was very offensive to her; that these dead carcasses and garbage generally had even attracted buzzards, and that she had seen there nearly or quite a dozen at one time. That she saw on one occasion on her lot one dead duck, one dead goose, one dead chicken and one joint of spoiled beef. That beef bones, rotten fish, beef brains and other filth were thrown upon her lot. That she could not say they came from the market, but she believed they did; they were not there before the market was erected. That on Sundays, and when the market was closed, flies swarmed into her house; that grape hulls, crab shells and cabbage leaves were thrown in great quantities about her front door, before which market-carts were drawn up to the sidewalk. That in consequence of the ground being raised in and around the market-house, a vast deal of water ran upon her lot and stood there for days after a heavy rain. Such is the direct sworn complaint of Mrs. Parker. It is all denied by the defendant, the plaintiff in error, who introduced a number of witnesses to make good the denial. It is not necessary to discuss the appellant's testimony, except to observe (1) that most of the witnesses do not live in the immediate vicinity of the market-house, and none of them, except one, as near as the residence of Mrs. Par-

ker, and while some of them visited the market daily, some occasionally, and others only passed the street (some distance in front of the market) several times a day, none of them had equal opportunities with Mrs. Parker of correct information as to the causes of her complaint; and (2) their testimony in relation to the grounds of complaint is negative in character, and not necessarily inconsistent with Mrs. Parker's testimony; in fact in some particulars there is a marked consistency.

No effort is made to discredit Mrs. Parker. She stands therefore not only unimpeached, but for the purposes of this case, unimpeachable. Taking her testimony, her case was made out. So thought the jury, and so thought the judge who presided at the trial. There remains only to be considered the defendant's third and fourth bills of exception; and these are practically one, and will be considered together.

In conclusion it need only be said that while the town of Suffolk, a municipal corporation, had authority to erect the market-house in question, yet the law requires it to be maintained and managed in a reasonably proper manner, and with a just regard to the rights of the owners of the adjacent property. So far from having performed this plain and reasonable duty, so essential to the health and comfort of others, it has so negligently and wrongfully used and conducted its market-place as to render it an intolerable nuisance to the defendant in error, and render it impossible to live in the house with any sort of comfort. This being so, the well-settled law is that said corporation is liable in damages. *People* v. *Corporation of Albany*, 11 Wend. 539; *Smith* v. *City Council of Alexandria*, 33 Gratt. 208; s. c., 36 Am. Rep. 788; *People* v. *Cunningham*, 1 Denio, 524; *Pruner* v. *Pendleton*, 75 Va. 516; s. c., 40 Am. Rep. 738.

Upon the whole, we are of opinion there is no error in the judgment of the said Circuit Court, and the same must be affirmed, with costs to the defendant in error.

Judgment affirmed.

NOTE BY THE REPORTER.—Compare *Henkel* v. *City of Detroit*, 49 Mich. 249; s. c., 43 Am. Rep. 464. See *Moulton* v. *Scarborough*, 71 Me. 267; s. c., 36 Am. Rep. 308, case of injuries by the town ram; *Logansport* v. *Dick*, 70 Ind. 65; s. c., 36 Am. Rep. 166, case of injury by blasting in a street; *Stanley* v. *Davenport*, 54 Iowa, 463; s. c., 37 Am. Rep. 216, case of injury by steam

motor in street; *Burton* v. *City of Chattanooga*, 7 Lea, 739, case of flooding; *Wilson* v. *City of Wheeling*, 19 W. Va. 323; s. c., 42 Am. Rep. 780, case of falling into a sewer excavation; *City of Jacksonville* v. *Drew*, 19 Fla. 106; s. c., 45 Am. Rep. 5, case of defective bridge; *Bennett* v. *Fifield*, 13 R. I. 139; s. c., 43 Am. Rep. 17, case of frightful obstacle in highway.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

FOUNTAIN COUNTY COAL AND MINING COMPANY v. BECKLEHEIMER.

(102 Ind. 76.)

Deed — "present heirs."

A deed in consideration of love and affection for the grantor's daughter and her "present heirs," and of $5, with *habendum* to the daughter "and her present heirs forever," does not vest fee in the daughter exclusively at common law.

THE opinion states the case.

L. Nebeker and *H. H. Dochterman*, for appellant.

T. F. Davidson and *C. E. Booe*, for appellee.

ELLIOTT, J. This controversy turns upon the effect of a deed executed by Isaiah Ferguson to his daughter, Nancy West, who was at the time it was executed, a widow with six children. The introductory part of the instrument reads thus: "This indenture witnesseth, that Isaiah Ferguson in consideration of natural love and affection which he bears to his daughter Nancy West and her present heirs, and the sum of $5, the receipt whereof is hereby

acknowledged, does give, grant and convey to the said Nancy West and her present heirs forever, the following real estate:" Here follows a description of the land, and the deed then proceeds thus: "To have and to hold the same to the said Nancy West and her present heirs forever. The grantor, his heirs and assigns covenanting with the grantee, her present heirs and assigns, that the title so conveyed is free, clear and unincumbered."

The contention of the appellant is that the deed vested in Nancy West an estate in fee-simple, and this involves the ruling question in the case.

Our decisions establish the doctrine that the rule in *Shelley's* case is the law of the State, and by them we are bound. *Ridgeway* v. *Lanphear*, 99 Ind. 251; *Shimer* v. *Mann*, 99 Ind. 190; *Maxwell* v. *Featherston*, 83 Ind. 339; *Gonzales* v. *Barton*, 45 Ind. 295; *Andrews* v. *Spurlin*, 35 Ind. 262; *McCray* v. *Lipp*, 35 Ind. 116; *Nelson* v. *Davis*, 35 Ind. 474; *Siceloff* v. *Redman*, 26 Ind. 251; *Doe* v. *Jackman*, 5 Ind. 283; *Sorden* v. *Gatewood*, 1 Ind. 107. If therefore the case is within that rule the appellant must prevail. The question is thus narrowed to this: Is the case within the rule?

It is an axiomatic principle that no person in life can have heirs; heirs apparent or presumptive there may be, but not legal heirs. The deed could not therefore have operated to convey land to the "present heirs" of Nancy West. As the deed could not have operated to convey to the heirs of Nancy West, the clause must be construed to convey to persons in being jointly with her, or else it must be disregarded. We cannot disregard the clause, emphasized as it is by clear and deliberate repetition, and we must ascribe to it the force which the law assigns it. Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered nor arbitrarily put aside. The words in the deed before us were deliberately written in the instrument, are there for a purpose, and are not without meaning. We can assign them a meaning without encroaching upon any rule of law, and by doing this, can give just effect to the intention of the grantor. Our reason for asserting that we can give them a meaning and thus effectuate the intention of the grantor is this: The real consideration of the deed is the love and affection which the grantor bore to Nancy West and her "present heirs," and it was these persons jointly, and not Nancy West alone, that he intended to make the recipients of his bounty. Our reason for asserting that we can assign a meaning to the words

that will carry the estate where the grantor meant it to go, without violating any rule of law, is this: That such words are descriptive of a class who shall take the estate, and are not words carrying an estate to the first-named person in severalty and to her successors in perpetuity, and consequently they operate to convey a joint estate to persons in being. The class, of which the words used in this deed are descriptive, is composed of Nancy West and her "present heirs" jointly, and as she can have no heirs while living, they mean heirs presumptive. Broom Leg. Max. 521.

The case, although a rare one, is not novel nor are the principles which govern it new to the law. Words of limitation are words used as descriptive of persons who are to take as the successors of the first person named, and the word "heirs" is usually such a word. The word is however not always assigned that force. Preston says, it cannot have that force if the "intention steers clear of the reason of the rule or of its liberal terms." Preston Estates, 275. The intention in this instance does "steer clear," for as it is prefectly obvious that Nancy West could not have "present heirs," the reason of the rule is avoided, and the words "present heirs" can only be regarded as descriptive of a class who are to jointly take the estate with the grantee expressly named. Recurring to Preston, we find it written by him, that "After the intention is fixed, the law decides on the gift; allowing the intention to govern, as often as it is clear that the word 'heirs' is not used, as descriptive of the class of legal successors, but in designation of an individual or of particular persons." Preston Estates, 275.

In Fearne on Remainders it is said, in speaking of the rule in *Shelley's* case, that "The rule will not be applied if there are any words mediately or indirectly, yet unequivocally, denoting that the persons who are to succeed are individuals other than persons who are to take simply as heirs general or special of the ancestor." 2 Fearne Remainders, 239. At another place this author says: "But if there are any words referring not merely to the mode of succession, but to the objects of succession, and clearly and unequivocally explaining or indicating them to be individuals other than persons who are to take simply as heirs general or special of the ancestor, the rule will not apply." 2 Fearne, *supra*, 238.

Chancellor Kent says: "Where the testator annexes words of explanation to the word heirs, as to the heirs of A., now living, showing thereby that he meant by the word heirs a mere *descriptio*

personarum, or specific designation of certain individuals," the case is not within the rule in *Shelley's* case. 4 Kent Com. 221.

In *Darbison* v. *Beaumont*, 1 P. Wms. 229, the provision reads thus: To "the first son of his (the testator's) body lawfully begotten, and the heirs male of such first son lawfully issuing," and it was held that this was a description of the person who was to take.

The devise in *Burchett* v. *Durdant*, 2 Ventr. 311*, was: "I give to my cousin John Higden and his heirs, during the life only of Robert Durdant, my kinsman, all those my messuages, etc., in Chobham in the county of Surrey; upon this trust and confidence, that he the said John Higden and his heirs, shall permit and suffer the said Robert Durdant, during his life, to have and receive the rents and profits thereof, which shall yearly grow due and payable. * * And from and after the decease of Robert Durdant, then do I give the said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living, and to such other heirs male and female as he shall hereafter happen to have of his body; and for want of such heirs, then to the use and behoof of my cousin Gideon Durdant and the heirs of his body."

The holding of the court, as the reporter gives it, was: "That this was a remainder vested in George Durdant; for the remainder being limited to the heirs of the body of Robert Durdant, now living, and George being found to be then the only son, it was a sufficient designation of the person, and as much as if it had been said, to his heir apparent," and that "George Durdant took an estate tail."

The reasoning of the court was, that as the person named could not have heirs in his life-time, the testator must be taken to have employed the words found in the devise as descriptive of the person who should take a present estate, and not as designating the successors of the first taker.

In *Vannorsdall* v. *Van Deventer*, 51 Barb. 137, the language of the will was: "*Fourth.* I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased, *Fifth.* And the legal heirs of my sister, Maria Snyder, deceased, *Sixth.* I give and bequeath to the heirs of my brother-in-law, William Van Deventer, all my real estate at the death of my wife, Elizabeth, to be divided

* See *Broughton* v. *Langley*, 2 Salk. 679, where HOLT, C. J., says that the case in Ventr. is not law.—REP.

equally between each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall," and the court held that the word "heirs" should be held to mean children of the persons named.

In *Simms* v. *Garrot*, 1 Dev. & B. Eq. 393, it was decided that "A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children."

In *Goodright* v. *White*, 2 W. Bl. 1010, the devise was to Margaret White and her heirs, now living, and it was held that the case was not within the rule. There are other cases declaring a like doctrine, but we deem it unnecessary to comment upon them. *Heard* v. *Horton*, 1 Denio, 165; *James* v. *Richardson*, 1 Ventr. 334; *Roberts* v. *Ogbourne*, 37 Ala. 174; *Powell* v. *Glenn*, 21 Ala. 458.

In *Shimer* v. *Mann*, *supra*, we examined this general subject and marked the distinction between cases where the words "heir" and "heirs" were employed as words of limitation, and those where, by the force of superadded words, these words were deemed to be descriptive of a class who should take, and held that in the one case they denoted successorship under the laws of descent, and in the other denoted individuals who should take the estate granted, and that as used in the instrument then before us they denoted successorship. We now encounter a case where they do not denote successorship, but describe a class who shall take the estate.

It has been very often held — there is, indeed, no conflict upon the question — that the technical words may be explained by superadded words, and that where it clearly and unequivocally appears that the word "heirs" was not used in its technical sense, it will be assigned the meaning given it by the person by whom it was used. *Shimer* v. *Mann*, *supra*, *vide* auth. p. 193; *Ridgeway* v. *Lanphear*, *supra*; *Rapp* v. *Matthias*, 35 Ind. 332; *Cleveland* v. *Spilman*, 25 Ind. 95.

We know that wills are construed with more liberality than deeds, and that courts are less inclined to depart from the technical meaning of the word "heirs" in the one case than in the other. *Shimer* v. *Mann*, *supra*; *Ridgeway* v. *Lanphear*, *supra*; *Cleveland* v. *Spilman*, *supra*. But in the case before us the meaning of the instrument is too plain to admit of doubt. It is certain that the often repeated words "present heirs" have some meaning, and it

is equally clear that they can only mean heirs apparent, who in this instance were the children of the person named.

In *Darbison* v. *Beaumont*, *supra*, it was said: "That the word 'heir' had in law several significations; in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir apparent, which supposed the ancestor to be living," and it was there held, as we hold here, that the word was used in the latter sense. The court in *Blake* v. *Stone*, 27 Vt. 475, applied this principle to a deed wherein the *habendum* was as follows: "To have and to hold the same to the said Leonard Burt for and during the term of his, the said Leonard Burt's natural life, and no longer, and in remainder to the heirs of his, the said Leonard Burt's, body (Charles Burt, son of the said Leonard, excepted), forever." In *Prior* v. *Quackenbush*, 29 Ind. 475, the question arose upon a deed, and it was held that the superadded words controlled the technical terms and created a life-estate. It is not possible that a deed containing the usual word "heirs" should in all cases be held to carry a fee, for there may be other words which will give force and effect to the deed and which will control the word "heirs," for no one would seriously insist that if the word "apparent" was prefixed, the technical meaning would not be changed. The rule is that it is only where the word is used in its technical sense that it necessarily operates to convey a fee. An eminent lawyer says: "The word 'heirs,' or 'heirs of the body,' must be used in their technical sense, as importing a class of persons to take indefinitely in succession. Hence if it appears that the words were not employed in this sense, but inaccurately, as designating particular individuals only, as if the limitation were to the heirs now living, the rule in *Shelley's* case would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent, or presumptive, would take a vested remainder." 2 Minor Inst. 343. This principle applies here. It is evident that the grantor did not use the word "heirs" in its technical sense, for it is inconceivable that he should bear natural love and affection to those who should succeed in an indefinite line the daughter whom he named. The words "present heirs" are quite as expressive and clear as the words "heirs now living," and it is obvious that the grantor meant to grant the estate to living persons for whom he cherished "natural love and affection."

There are cases where words annexed to the word "heirs" may

be rejected as repugnant, but this is not such a case. Here the words employed by the grantor describe the persons who shall take and do not undertake to limit or define the mode of succession. Words superadded to the word "heirs" may be rejected when they undertake to limit the mode of succession and to override the rules of law, but not when they are employed for the purpose of designating the persons who shall take the estate. If we should assume that the word "heirs" is used in its technical sense, then there would be ground for holding that there was a repugnancy, but this we cannot assume, for the superadded words show that it was not thus used, but was used in the sense of heirs apparent or presumptive. Counsel quote from Preston what we regard as the true rule upon the question under immediate discussion. That author says: "It is also a rule, that the limitation must not prescribe an order of succession from the purchaser, differing from the order of succession which the law has established." Preston Estates, 461. But this rule does not govern here, for there is here no attempt to establish an order of succession; there is a description of the grantees who shall take the estate granted, namely, "Nancy West and her present heirs," and not a designation of those who shall succeed. The language employed by the grantor does not prescribe a mode of succession, but describes the persons who shall take the estate granted. Nancy West and her heirs apparent are indicated as the grantees; they are not described as the successors of a first taker. There is no attempt to fix or control the manner of succession; the grantor simply indicates that he entertains natural love and affection for his daughter and her present heirs, and to manifest that affection, grants to them the land conveyed.

It was the inexorable rule of the common law that unless the word "heirs" was employed in a deed, and employed in its technical sense, an estate in fee was not created, and as the word is not so employed in the deed before us, it did not, under the common law rule, convey the fee. It is argued by appellant's counsel that the grantor intended to convey the fee, and therefore that the instrument should be construed to create an estate in fee in Nancy West, but the answer to this argument is that the deed was executed in 1851, and is governed by the common-law rule, for the statute changing the rule was not enacted until May 6, 1852. *Nicholson* v. *Caress*, 45 Ind. 479; *Nicholson* v. *Caress*, 59 Ind. 39.

It is also argued that the word "present" should not be allowed

to control the word "heirs," but this argument cannot prevail, for the word is used deliberately, is several times repeated, and does essentially modify and qualify the meaning of the word which it precedes. The signification which the qualifying word annexes to the word "heirs" is not an unknown or strange one, but is one recognized by general use and by the law. Broom Leg. Max. 521. The modification is so essential as to strip the word "heirs" of its technical meaning and give it the general meaning of heirs apparent. It is impossible to escape this conclusion without holding that in no case can the meaning of the term "heirs" be modified, and this, as the authorities cited very satisfactorily prove, would be unreasonable and unjust. It needs no argument to prove that it is just to permit a grantor to select and designate the objects of his bounty, and that it is reasonable to permit him to affix his own definition to the words which he employs. If Isaiah Ferguson had used the words "the apparent heirs," or the words "the presumptive heirs," of Nancy West, we suppose nobody would dream of doubting that the word "heirs" was not used in its technical sense, and the word "present" so clearly shows that he meant heirs presumptive that we perceive no ground upon which it can be even plausibly maintained that the word "heirs" was used in its technical sense.

Another view of the case is presented by counsel, for they maintain that the words employed in the deed create an estate tail. We think this position is fully answered by Blackstone's statement of the rule: "As the word heirs," he says, "is necessary to create a fee, so in further limitation of the strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs. So on the other hand, a gift to a man, and his heirs male or female, is an estate in fee simple, and not in fee tail; for there are no words to ascertain the body out of which they shall issue. Indeed in last wills and testaments, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man and his seed, or to a man and

his heirs male; or by other irregular modes of expression." 2 Bl. Com. 114. In the deed before us the limitation is not to the heirs of the body of Nancy West, but the grant is to her and her heirs apparent, whether they are or are not the issue of her body. There are therefore no words of procreation.

The question presented on the motion to modify the judgment is this: Did Nancy West take a life estate in one-half of the lands, or did she take in common with her presumptive heirs, her children? We think that Nancy West and her heirs apparent took the estate in common, and that the judgment of the court below so adjudging was right. The rule is that where a thing is granted to several persons, and their respective interests are not specifically designated, they take jointly. *Wilburn* v. *Wilburn*, 83 Ind. 55; *Crockett* v. *Crockett*, 22 Eng. Ch. Rep. 553; *Allen* v. *Hoyt*, 5 Metc. 324.

Judgment affirmed.

Carthage Turnpike Company v. Andrews.

(102 Ind. 138.)

Evidence — non-expert opinions — health.

Non-expert opinions as to the health and physical condition of another, based upon personal knowledge, are competent.*

ACTION for personal injuries by negligence. The opinion states the point.

C. G. Offutt, R. A. Black, J. H. Mellett, E. H. Bundy, W. A. Cullen, B. L. Smith and *W. J. Henley*, for appellant.

J. A. New and *J. W. Jones*, for appellee.

Zollars, J. One of appellant's bridges, over which appellee was driving, broke and fell, and he was thereby injured. He brought this action to recover damages, charging appellant with negligence in not maintaining the bridge in a proper and safe condition.

[Unimportant statements omitted.]

James O. Butler, one of appellee's witnesses, testified that he had known him since his boyhood, and had seen him frequently, and

* See *Inhabitants of Fayette* v. *Inhabitants of Chesterville*, *post*.

during the five years preceding the trial had lived near him. After having stated this, the following questions, over appellant's objections, were put to the witness by appellee's counsel, and the following answers made, viz.:

"Q. What has been his health and physical condition from the time you have known him up to the time of his injury? A. Why, his health up to that time was good; he seemed to be stout and hearty, so far as I know.

"Q. What was his physical appearance? A. Why, he appeared to be stout and hearty.

"Q. Was there any other appearance? A. He was a good, sound-looking man, with some life about him.

"Q. How was he as to flesh before this injury? A. He was fleshy; a good deal fleshier than he is now.

"Q. How was he as to weight? A. He was a good deal heavier than he is now; he used to weigh from one hundred and eighty to one hundred and eighty-five pounds.

"Q. Since the injury what has been the condition of his health? A. He has had but very poor health.

"Q. What has been his physical appearance? A. He has been very weak and slow; he does not seem like the same man hardly, in physical strength.

"Q. How as to his flesh and weight since the injury? A. Well, he has fallen off considerably.

"Q. What changes, if any, have you observed in the expression of his countenance? A. He did not look like the same man hardly; that is, to the best of my knowledge; he did not seem to notice things like he used to."

James Anderson, another of appellee's witnesses, testified that he had known him intimately and seen him often during the last twenty-four years. After having thus testified, the following questions, over appellant's objections, were propounded to the witness, to which he made the following answers:

"Q. What was his physical condition as to health up to the time of the injury? A. Well, his appearance looked like he might be a stout man; I always supposed he was from his appearance; of course, I am no doctor; he had a healthy look.

"Q. What was his condition as to health and physical condition on yesterday? A. Why, he looked very much worn down to what he was the last time I saw him."

The substance of the testimony of these witnesses, taken as a whole, is that from their long and intimate acquaintance with appellee, from their observations of him, and his physical appearance, certain characteristics of which they gave, in their judgment, he was a stout and healthy man before the injury, and sick and not so stout thereafter. Taken as a whole, the most that can be fairly said is that the testimony amounts to the opinions of the witnesses, based upon their observation and the facts stated.

It would have been more orderly to have drawn out all of the statements of the witnesses before asking their judgment or opinion, but as the jury were put in possession of the facts as a part of the testimony in chief, it would seem that the manner and order in which it was done ought not to be fatal to appellee's case. It should be observed too that the objections below were not that the witnesses had not stated the facts upon which they based their opinions. The objections were broad and general ones, that the witnesses could not give their opinion, because they were not experts.

Regarding the testimony as we think it should be regarded, it is brought within the general rule that non-expert witnesses may give their opinions, if they state, as far as possible, the facts and observations upon which they are based. That non-expert witnesses may thus give their opinions is well settled by the adjudications of this court. *House* v. *Fort*, 4 Blackf. 293; *City of Indianapolis* v. *Huffer*, 30 Ind. 235; *Benson* v. *McFadden*, 50 Ind. 431; *Holten* v. *Board, etc.*, 55 Ind. 194; *Coffman* v. *Reeves*, 62 Ind. 334; *State* v. *Newlin*, 69 Ind. 108; *Mills* v. *Winter*, 94 Ind. 329.

That a non-expert may give an opinion at all is the rule of necessity. He must in all cases, so far as possible, state the facts upon which he bases his opinions. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are as well qualified as the witness to form a conclusion. But there are cases where the witness cannot put before the jury, in an intelligible and comprehensible form, the whole ground of his judgment or opinion. When questions as to the conditions of the mind and body are the questions in issue, there are often many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer that cannot be conveyed in words to the jury. That a person appears to be sad or sick may well be known by observation, and yet there is no way to describe the appearance except by

the words that necessarily embody the conclusion reached by observation. In such cases, if the witness states that he is acquainted with, has had opportunity to and has observed the party, this, it has been held, is sufficient to render the witness competent to state the condition of the party mentally or physically. The weight to be given to such evidence, of course, will depend upon the intelligence of the witness, the intimacy of his acquaintance with the party, and upon other things that may appear by the examination in chief, and by a cross-examination. *Bennett* v. *Meehan*, 83 Ind. 566; s. c., 43 Am. Rep. 78, and cases there cited.

In this case the court quoted with approval from 1 Whart. Ev., § 512. "So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which cannot be specifically described." *Loshbaugh* v. *Birdsell*, 90 Ind. 466. In this case the court quoted with approval from 1 Greenl. Ev., § 440, as follows: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct and bearing, whether friendly or hostile, and the like." The same quotation was made with approval in the case of *Johnson* v. *Thompson*, 72 Ind. 167; s. c., 37 Am. Rep. 152. See also *Yost* v. *Conroy*, 92 Ind. 464; s. c., 47 Am. Rep. 156; *Indiana, etc., Ry. Co.* v. *Hale*, 93 Ind. 79; *Goodwin* v. *State*, 96 Ind. 550; *Hamm* v. *Romine*, 98 Ind. 77; *Wilkinson* v. *Mosely*, 30 Ala. 562; *Blackman* v. *Johnson*, 35 Ala. 252; *South and North Ala. R. Co.* v. *McLendon*, 63 Ala. 266; *Chicago, etc., R. Co.* v. *George*, 19 Ill. 510; *Willis* v. *Quimby*, 11 Foster, 485; *Elliott* v. *Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Culver* v. *Dwight*, 6 Gray, 444; *Irish* v. *Smith*, 8 S. & R. 573; *Parker* v. *Boston, etc., Co.*, 109 Mass. 449; Best Ev. 494; *Commonwealth* v. *Sturtivant*, 117 Mass. 122; s. c., 19 Am. Rep. 401; *Evans* v. *People*, 12 Mich. 27; Abbott Trial Ev. 599, 600. Under our own cases, and those above cited, some of which carry the rule further than it is necessary for us to extend it here, the testimony objected to was competent.

[Minor points omitted.]

After an examination of the several questions discussed by counsel, we have reached the conclusion that there is no error in the record for which the judgment should be reversed. It is therefore affirmed with costs.

Judgment affirmed.

VIGO AGRICULTURAL SOCIETY v. BRUMFIEL.

(102 Ind. 146.)

Bailment — agricultural society — loss of exhibitor's articles.

An agricultural society, inviting persons to lend articles for exhibition at a fair, and promising to take care of them, is responsible if they are stolen by its negligence.

ACTION for loss of property by negligence. The opinion states the case. The plaintiff had judgment below.

S. C. Davis and *S. B. Davis*, for appellant.

I. N. Pierce, T. W. Harper and *B. E. Rhoads*, for appellee.

ELLIOTT, J. Gathered into a condensed form, the material averments of the appellee's complaint are these: The Vigo Agricultural Society is an association, organized under the laws of the State for the purpose of conducting fairs for the exhibition of agricultural products, manufactured articles, and other things. Prior to September, 1883, the society issued advertisements inviting persons to place articles on exhibition at a fair to be held in that month. The society agreed to take care of articles placed on its ground by exhibitors. The appellee, in response to the invitation of the society, did put a gun of which he was the owner on exhibition in the place appropriated for that purpose, and while the gun "was in the care and keeping of the society," it negligently and carelessly suffered it to be stolen, without any fault on the part of the appellee.

The question presented by the demurrer to the complaint is not as to the general duties and liabilities of an agricultural association, but the question is as to the law upon the facts pleaded. The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character, that of a bailment for reward. The reward was not, it is true, in money, but it was nevertheless a reward in the form of an act performed at the request of the bailee.

An association which invites persons to supply articles to enable it to conduct an exhibition receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition.

Where a consideration of an indeterminate value is agreed upon by the parties, the courts will not undertake to determine its adequacy, but will respect the judgment of the parties and enforce their contract. *Wolford* v. *Powers*, 85 Ind. 294; s. c., 44 Am. Rep. 16; *Williamson* v. *Hitner*, 79 Ind. 233; *Neidefer* v. *Chastain*, 71 Ind. 363; s. c., 36 Am. Rep. 198; *Smock* v. *Pierson*, 68 Ind. 405; s. c., 34 Am. Rep. 269; *Baker* v. *Roberts*, 14 Ind. 552; *Hardesty* v. *Smith*, 3 Ind. 39. The complaint avers that there was an agreement to take care of the gun, and the facts stated show a sufficient consideration for the agreement, and as the contract was one of bailment for hire, the bailee is responsible for the loss resulting from its negligence. The agreement bound the society, and if its negligence caused the loss, it must respond. What the rule would be where there was no promise to bestow care upon the articles exhibited, we need not decide, for here was, as the complaint avers and the demurrer admits, a promise which created a bailment.

The appellant demurred to the evidence, and it is necessary, before entering upon the discussion of the main question, to ascertain and state the rules which must guide us in considering the evidence.

[Omitting this.]

The testimony shows that the gun was taken to the office of the secretary of the society, where entries were made by the exhibitors; that it was entered in the proper book; that appellee's agent was provided with an exhibitor's tag, directed to attach it to the gun and place it in the "Mechanical Hall," and that he obeyed the directions given him. This hall was a large building and very insecurely fastened. It was not guarded by any policeman or by any other person. It was proved that the chief of police of the city of Terre Haute, who was employed to take charge of the policemen engaged about the fair grounds, suggested to one of the principal officers of the society that there should be some policemen stationed about the "hall," but that officer directed him not to place any policemen about it, stating that "there was nothing in it." In making this statement, the officer was in error, for there were articles of value in it besides the appellee's gun. From the

hall, where it had been placed by direction of the secretary, it was stolen and carried away. Sometime prior to the time the fair was held, the society issued advertisements inviting persons to place articles on exhibition, and these advertisements were seen and read by the appellee, who was induced by them to place his gun on exhibition. In one of the rules issued by the society, and contained in one of its advertising pamphlets, was the following: "The association will keep an efficient police force on the grounds day and night to take care of articles on exhibition, but will not be responsible for any damages."

The clear and indeed the only legitimate inference from the evidence is, that the appellant neglected to keep an efficient police force on the grounds. It appears that the attention of its officers was called to the inadequacy of the police; to the fact that one place where valuable articles were kept was wholly without guard or protection. At a few places on the grounds there were policemen on guard, but none about the building where the appellee's gun was placed. So far as that spot was concerned, it was as if there had been no police protection at all supplied.

We do not deem it necessary or proper to discuss the general question as to the duties and liabilities of agricultural societies organized for the purpose of conducting fairs, for here the question is very much narrower. The question here is as to the liability of a society that invites and secures the exhibition of articles at its fair upon the promise to "keep an efficient police force on the ground day and night to take care of articles on exhibition." It may be true that where there is no promise of this character the exhibitor assumes the risk, but as there is here a promise, that question is not before us, and of course is not decided.

It is an elementary principle that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. An American author says: "I may bind myself contractually by a general proposal to do a particular thing for the benefit of any person who renders me a particular service, or takes part with me in a common risk." 1 Whart. Cont., § 24. The foundation and extent of this doctrine is well and philosophically discussed by an English writer who has collected many cases of different kinds illustrating the various phases of the subject. Pollock Cont. 174. The essential difference between what Pollock calls a contract by advertise-

ment, and an ordinary agreement, is that in the former case there is no complete contract until performance, while in the latter there is a contract as soon as there is an acceptance of the proposal. The principle we have stated finds its most frequent illustration and application in cases of the offer of rewards, but it is by no means confined to such cases. It is the principle which governs in the cases of the publication of time-tables and rules by railroad companies. *Crocker* v. *New London, etc., R. Co.*, 24 Conn. 249; *Sears* v. *Eastern Railroad Co.*, 14 Allen, 433; *Denton* v. *Great Northern Ry. Co.*, 5 E. & B. 860. It is also the principle which controls in cases of general circular letters, and in prospectuses by joint stock companies and corporations. *Ex parte Asiatic Banking Corporation*, L. R., 2 Ch. App. Cas. 391; *Maitland* v. *Bank, etc.*, 38 L. J. Eq. 363; *Warlow* v. *Harrison*, 1 E. & E. 295; *Adams'* case, L. R., 13 Eq. 474. In the case before us the appellee performed the act required of him by the party who issued the advertisement, and the contract was therefore complete.

As the appellant promised to do a specified act if the appellee would place his property on exhibition, and as the appellee did do this, it is impossible to hold that the former assumed no duties without running counter to the best settled and most generally known rules of law. The promise means something, and if it does, then it did create an obligation. Either the promise imposed some duty on the promisor, or it is utterly meaningless; but it is not meaningless, and therefore it did impose some duty, and that duty was, in the very words of the promise itself, to "keep an efficient police force on the grounds day and night to take care of articles on exhibition."

If a police force had been kept as promised, then a radically different case would have been before us; but the clear inference from the evidence is that no force was kept about the hall where the property of the appellee was placed. The reason there were no policemen stationed there was because the appellant was negligently ignorant of the fact that there was at that place the property of exhibitors put there, in response to an invitation and in accordance with the directions of the appellant's officers.

It needs neither the citation of authorities nor the statement of arguments to prove that if one assumes a duty, and negligently omits to perform it, he must answer to the person to whom the duty was owing for the loss occasioned by the negligence.

The liability of the appellant does not arise out of the fact that the gun was stolen, but springs from the fact that there was a negligent omission of the duty which the appellant had assumed. The evidence fully tends to show that the negligent omission of the duty was the cause of the loss, and this is sufficient. It is sufficient where a cause is submitted to a jury, and even in prosecutions for the highest of crimes, that the circumstances lead by a just process of inference to the conclusion reached, and certainly this is sufficient where the defendant demurs to the evidence. The general rule is that conclusions may be deduced from the facts proved, and here there were abundant facts justifying the conclusions of the trial court upon every material point, but the rule is here more liberal to the plaintiff than the general one, for here the demurrer admits all the facts and inferences.

Counsel for the appellant do not refer to or place any stress upon the clause in the society's rules reading, "but will not be responsible for any damages," and it may be that we do an unnecessary thing in noticing it, but we have thought best not to pass it entirely unnoticed. It is evident that the clause quoted does not withdraw the promise "to keep an efficient police force on the grounds day and night to take care of the articles on exhibition," but that it simply means that the society will furnish a police force, and having furnished such a force, will not be responsible for losses. It would violate the plain meaning of the language to give the provision any other interpretation. If the promise to provide a police force had been complied with, then, under the clause quoted, the society would have been absolved from all liability, but the effect of that direct promise is not made null by the clause declaring that the society will not be responsible, for it is very plain that this clause can only be construed to absolve from responsibility in case the promise is kept.

The question as to the regularity of the entry of the gun is settled by the admissions of the secretary of the society, and upon a demurrer to the evidence, there can be no question made as to the probability or improbability of the testimony.

Judgment affirmed.

QUARL v. ABBETT.

(102 Ind. 233.)

Fraud—impeaching fraudulent transfer by non-resident—necessity for judgment.

A judgment setting aside a fraudulent transfer of corporate stock by a non-resident may be rendered upon constructive service of process, and it is not essential that the creditor should first obtain judgment on his demand. (*See note, p.* 673.)

ACTION to set aside a fraudulent transfer of stock. The opinion states the case. The plaintiff had judgment below.

A. B. Young, H. W. Harrington and *A. G. Howe*, for appellant.

R. Hill and J. *W. Nichol*, for appellee.

ELLIOTT, J. The material facts stated in the complaint of the appellee are these: Vincent A. Quarl and Samuel Lefevre are non-residents of the State, and the latter indorsed to the appellee two promissory notes, executed by Bledsoe and others to the appellee. At the time the notes matured the makers were insolvent, and so remained. At the time of the indorsement made by him, Lefevre owed debts amounting to $10,000, and was the owner of twenty-four shares of the capital stock of a corporation known as the Indiana Chair Manufacturing Company, and to cheat and defraud his creditors, entered into a conspiracy with Quarl, and pursuant to the fraudulent purpose, did transfer and assign all of the stock to Quarl on the books of the company, which transfer was accepted with full knowledge of the assignor's fraudulent intent. Nothing was paid by Quarl for the stock, and he appears on the books of the corporation to be the owner. The prayer is that the court will ascertain the amount due the plaintiff, adjudge the transfer of the stock to be fraudulent, and decree that the property be sold as on execution to satisfy appellee's claim. Concurrently with the complaint the appellee filed an affidavit reading thus: "Said plaintiff says he has a good and valid cause of action against Samuel Lefevre and Vincent A. Quarl, which as to said Lefevre is founded upon the indorsement to this plaintiff of certain promissory notes, and as to said Lefevre and Quarl jointly, is founded upon the fraudulent transfer to said Lefevre of certain property

more particularly described in the complaint in this cause, which transfer grows out of and is connected with the indorsement of said notes by the said Lefevre to this plaintiff. And he further says that said defendants, Lefevre and Quarl, are non-residents of the State of Indiana."

An affidavit and undertaking in attachment were also filed, and the writ issued at the suit of the appellee was levied on the stock standing in the name of Quarl on the books of the company. The complaint and affidavit for publication were filed on the 17th day of April, 1878. On the 11th day of June, 1878, proof of publication of notice was made. The notice reads as follows:

"*Oliver H. P. Abbett* v. *Samuel L. Lefevre, V. Augustus Quarl, Indianapolis Chair Manufacturing Company.*

"No. 21,993. Room 4. April Term, 1878.

"Be it known, that on the 17th day of April, 1878, the above-named plaintiff, by his attorneys, filed in the office of the clerk of the Superior Court of Marion county, in the State of Indiana, his complaint against the above-named defendants for attachment, and that on the said 17th day of April, 1878, the said plaintiff filed in the said clerk's office the affidavit of a competent person showing that said defendants, Samuel L. Lefevre and V. Augustus Quarl, are not residents of the State of Indiana. Now therefore by order of said court, said defendants last above-named are hereby notified of the filing and pending of said complaint against them, and that unless they appear and answer or demur thereto at the calling of said cause on the second day of the term of said court, to be begun and held at the court-house, in the city of Indianapolis, on the first Monday in June, 1878, said complaint and the matters and things therein contained and alleged will be heard and determined in their absence.

"AUSTIN H. BROWN,
"*Clerk.*"

On the day last-named the cause was submitted to the court and a finding and a judgment entered in favor of the appellee. In December, 1879, Quarl appeared and filed a motion to open the judgment, and his motion was sustained. On the 3d day of January, 1880, he filed an answer of general denial, and on the first day of the following July, the cause was, by agreement, submitted to the court for trial. The trial resulted in a finding and judgment for

the appellee. In September, 1880, a motion for a new trial was overruled, appeal was taken to the General Term and the judgment of the Special Term affirmed on the 2d day of May, 1881.

The appellant contends that no jurisdiction of the person of the defendants was obtained, and therefore no personal judgment could be rendered. We concur with counsel that no personal judgment can be rendered in a case where there is constructive service, but we cannot concur in the conclusion which is deduced from this proposition. It does not follow that property fraudulently transferred may not be reached and subjected to sale in an action commenced by publication. A personal judgment is one which binds the defendant, while a judgment which operates upon property is, in its essential features, a judgment *in rem*. Such a judgment creates no personal liability, but operates upon the particular property which constitutes the subject of litigation. A judgment operating solely upon property cannot be made the foundation of an action against the defendant; nevertheless it may effectively operate upon the particular property within the jurisdiction of the court. If the appellant is right, then a citizen of Indiana can never reach property within our jurisdiction, if it is claimed by a non-resident. If the appellant is correct then our statutory provisions providing for attachments against non-resident debtors is absolutely null, for in every case it is necessary to ascertain the amount of the debt in order to make a proper order of sale, and this proves his argument to be unsound.

It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. "If a foreigner or citizen of another State," says an able court, "send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate." *Clark* v. *Tarbell*, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. *Ames Iron Works* v. *Warren*, 76 Ind. 512; *Green* v. *VanBuskirk*, 7 Wall. 139; *Rice* v. *Courtis*, 32 Vt. 460. It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere

empty legislative declarations, without either force or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the courts would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a claim against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor if the rule were as asserted, could property of non-resident corporations within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Judge Story says: "Sometimes the seizure or attachment is purely nominal, as for example, of a chip, or a cane, or a hat. In other cases the seizure or attachment is *bona fide* of real property or personal property within the territory, or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment." Story Conf. Laws, § 549. Wharton says: "But when the thing is situate within the jurisdiction of the court, then proceedings *in rem* give a title to it against all the world." Wharton Conf. Law, § 829. He applies this doctrine to the seizure of goods under a writ of ateachment, and cites *Ewer* v. *Coffin*, 1 Cush. 23; *Phelps* v. *Holker*, 1 Dall. 261; *Pawling* v. *Bird*, 13 Johns. 192; *Arndt* v. *Arndt*, 15 Ohio, 33; *Mc Vicker* v. *Beedy*, 31 Maine, 314; *Bissell* v. *Briggs*, 9 Mass. 462.

Freeman says: "Proceedings by attachment are not, strictly speaking, *in rem*, and yet they are sometimes so spoken of, and in some respects their effect is more, and in others less comprehensive than the effect of proceedings *in personam*. Thus by the seizure of the property, as where moneys are garnished, jurisdiction is acquired over the fund, so that orders may be made for its distribution or payment which will bind the owner, though he has not

appeared nor been personally summoned in the case, provided such owner is in law or in fact a defendant in the action." Freeman Judg., § 607*a*. The Supreme Court of the United States, in speaking of notice by publication, says: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*." *Pennoyer* v. *Neff*, 95 U. S. 714, 727. The issuing of the writ and the levy by the sheriff brought the property within the jurisdiction of the court. But we need not stop at this point, for the power to issue a writ, effective to seize the property, was jurisdiction. It is well settled that authority to move in a cause, even to determine that there is authority, is jurisdiction. *Lantz* v. *Maffett*, 102 Ind. 23; *Snelson* v. *State*, 16 Ind. 29; *Board, etc.*, v. *Markle*, 46 Ind. 96; *Rhode Island* v. *Massachusetts*, 12 Pet. 657. There was therefore jurisdiction of the subject of the action, and the notice, under the provisions of the statute providing for notice by publication, gave jurisdiction of the person so far as necessary to determine the rights of the litigants in the particular property within the jurisdiction of the court.

It is said by appellant's counsel, that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this cannot be true is too clear to admit of debate.

The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. The principle is an ancient one, and even in the time when the contest between the chancery courts and the common-law courts was hot and angry, it was recognized and enforced. Where the jurisdiction

of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy. *Field* v. *Holzman*, 93 Ind. 205; *Carmichael* v. *Adams*, 91 Ind. 526; 1 Pom. Eq. Jur., § 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of the indebtedness, for in almost every case the court must ascertain the indebtedness. Thus in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so in an action to enforce a claim against property fraudulently conveyed, the amount of the debt must be ascertained, and so in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court in ascertaining the amount due does not proceed against the person, but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case.

Where there is some notice, although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction. *Brown* v. *Goble*, 97 Ind. 86, 89; *City of Terre Haute* v. *Beach*, 96 Ind. 143; *McCormick* v. *Webster*, 89 Ind. 105; *Oppenheim* v. *Pittsburgh, etc., Ry. Co.*, 85 Ind. 471; *Stout* v. *Woods*, 79 Ind. 108; *McAlpine* v. *Sweetser*, 76 Ind. 78; *Hume* v. *Conduitt*, 76 Ind. 598; *Muncey* v. *Joest*, 74 Ind. 409; *Morrow* v. *Weed*, 4 Iowa, 77; *Smith* v. *Engle*, 44 Iowa, 265; *Ballinger* v. *Tarbell*, 16 Iowa, 491; Freeman Judg., § 126. The rule with respect to notice by publication is the same as to notice by service of summons; there is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as of right, to open the judgment and try the cause. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law. 3 Bl. Com. 283, 444; *Hahn* v. *Kelly*, 34 Cal. 391. There is therefore no valid reason why the same presumptions should not obtain in cases where the notice is by publication as where it is by service of summons, and

the weight of authority is to that effect. *Nash* v. *Church*, 10 Wis. 244; *Gemmell* v. *Rice*, 13 Minn. 400; *Newcomb* v. *Newcomb*, 13 Bush, 544; *Lawler* v. *White*, 27 Tex. 250. In the recent case of *Dowell* v. *Lahr*, 97 Ind. 146, it was held, after full consideration, that the presumption was in favor of the validity of the judgment of the court, and that it could not be shown in a collateral attack that the notice, although by publication, was insufficient or irregular, and this decision is supported by the cases to which we have referred and by other cases in our own reports. The notice in this case therefore conferred jurisdiction against Lefevre, and the judgment against him cannot be collaterally impeached. The appellant appeared and answered without questioning the jurisdiction, and as to him there was certainly jurisdiction, so that the judgment, as the record presents it to us, appears to have been rendered in a cause where the court had plenary jurisdiction. This is so because Lefevre cannot and does not attack it, and the appellant has waived all questions of that character. Quarl is protected by the judgments as against any claim Lefevre might have, because as expressly decided in *Dowell* v. *Lahr*, *supra*, Lefevre cannot collaterally attack the judgment, and as to him it was not opened. So far as concerns the rights of the appellant, they were tried upon the issue tendered by his answer, and he of course cannot now assert that there was no jurisdiction of his person, at least in so far as concerned the property described in the complaint and seized under the writ of attachment. *Cool* v. *Peters' Box, etc., Co.*, 87 Ind. 531.

The rule that obtained in chancery under the old system, requiring a judgment and an execution to be secured by the creditor before resorting to equitable relief, is invoked by appellant, and we are referred to many cases. Doubtless the general rule was as stated by counsel; whether it prevails under the reformed system of procedure is quite another question; but without stopping just now to decide that question, and for the present granting that the rule does prevail, still it never did govern such a case as this — manifestly it could not apply — for against a non-resident the creditor could not possibly obtain a personal judgment. It is hardly necessary to cite authorities to prove that two notable exceptions to the rule were, where the debtor was dead or "beyond seas." *Kipper* v. *Glancey*, 2 Blackf. 356.

The case of *Scott* v. *Indianapolis Wagon Works*, 48 Ind. 75, decides, and rightly decides, that a creditor may maintain a bill

against a debtor and his assignee to set aside a fraudulent transfer of the capital stock of a corporation. If that case stands, it rules here, and not only do we feel bound to adhere to it upon the principle of *stare decisis*, but for the further reason that it asserts the true doctrine. We can conceive no reason why a fraudulent sale of capital stock in a corporation may not be declared void and the stock made liable to the claims of the creditors of the assignor. Stock is property, and the policy of the law is to enable creditors to make their debts out of the property of the debtor. What imaginable equity is there in allowing a fraudulent assignee to hold stock as against creditors? The property is of a peculiar nature, and when, as in this instance, transferred on the books of the company, it can be most effectively reached by a decree of court, setting the transfer aside and subjecting the stock to the claim of the creditor. A recent writer says: "The tendency of the authorities is to reclaim every species of the debtor's property, prospective or contingent, for the creditor. As has been seen, transfers of intangible rights and choses in action, such as stocks, annuities, life insurance policies, book royalties, patent-rights, legacies and choses in action generally, may be reached." Wait Fraud. Conv. 24. If the stock had remained in the name of the debtor, it could have been levied on by ordinary legal process, and it is, as another author says, the rule that "whenever a statute enables a creditor to reach property, either by attachment or execution, a transfer of it becomes liable to investigation on the ground of fraud." Bump. Fraud. Conv., § 239. Equity will always aid the law, and here equity assistance is required to fully adjudicate upon the rights of the parties and completely protect the rights of the creditors. If the stock had remained in the name of Lefevre, then perhaps the writ of attachment would have accomplished all that was necessary, but it was in the name of the fraudulent assignee, and the creditor had a right to have this fraudulent assignee's colorable title overthrown, and all questions of ownership settled, so that ultimately his rights might be fully vindicated.

Suits to set aside fraudulent transfers of property are properly of equity cognizance. This doctrine we have explicitly affirmed by our decisions, that such suits must be tried by the court, and not by a jury. *Hendricks* v. *Frank*, 86 Ind. 278; *Evans* v. *Nealis*, 87 Ind. 262. But under our Code, we have only one form of action and one tribunal, and while there may be issues in the same action

of an equitable and legal nature, there is only one court for their trial, and hence they may be embraced in one action. We have, under this principle, held that a plaintiff may have an attachment and may also foreclose a mortgage. *Martin* v. *Holland*, 87 Ind. 105. Upon a like principle, it must be held that an attachment may issue in an action brought to set aside a fraudulent conveyance and subject to sale property fraudulently conveyed. It is indeed impossible to conceive how it could be otherwise, since there is but one court, and parties are required, wherever practicable, to settle the entire controversy in one action. We have many cases recognizing and enforcing this principle, among them *Field* v. *Holzman*, *supra*; *Frank* v. *Kessler*, 30 Ind. 8; *Lindley* v. *Cross*, 31 Ind. 106. It is held in these cases that an action may be maintained to obtain judgment on a claim, and also to set aside a fraudulent conveyance, and this is the principle which governs here. As the appellee had a right to an attachment, and a right to have the fraudulent transfer set aside, his proceedings were well brought, and as the court had general jurisdiction of such subjects, and as notice was given as provided by statute, the judgment was proper. The description of the property in the complaint brought the matter within the jurisdiction of the court; the notice by publication brought Lefevre into court as to that property, and the appellant, having been notified and having appeared without objecting to the process, is bound by that judgment.

Counsel cite *Griffin* v. *Nitcher*, 57 Me. 270; *Tennant* v. *Battey*, 18 Kans. 324; *Weil* v. *Lankins*, 3 Neb. 384; *Bigelow* v. *Andress*, 31 Ill. 322; *Martin* v. *Michael*, 23 Mo. 50; *McMinn* v. *Whelan*, 27 Cal. 300; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Jones* v. *Green*, 1 Wall. 330, and *Harrell* v. *Whitman*, 19 Ala. 135, and we have examined them but find them not in point. They declare the general rule, which prevailed under the old system, that only judgment creditors can maintain a suit to set aside a fraudulent conveyance, and as our law is different, the cases cited are not applicable. But even under the old system the rule was a general one to which there were, as we have seen, notable exceptions. It is clear that there must be exceptions, for no rule can be sound which requires a creditor to obtain a judgment *in personam* where there can be no jurisdiction of the person, since that would be to require him to do an impossible thing. If a personal judgment cannot be obtained, then the creditor must be

permitted to resort to the only remedy open to him, a proceeding against the property. The case before us comes within another exception to the general rule, for it is a proceeding in aid of a legal writ and essential to secure a complete adjustment of the rights of the parties. Bump Fraud. Conv. 239; *Greenleaf* v. *Mumford*, 50 Barb. 543; *Mills* v. *Block*, 30 Barb. 549; *Rinchey* v. *Stryker*, 28 N. Y. 45; *Falconer* v. *Freeman*, 4 Sandf. Ch. 565; *Kelly* v. *Lane*, 42 Barb. 594. But we need not stop to consider the rule under the old system, for our statute and our decisions fully and explicitly recognize the right of a general creditor to set aside a fraudulent transfer of property.

Our statute and our decisions have long established the rule that property fraudulently conveyed may be levied on, and if this be true, as unquestionably it is, then it is subject to attachment. *Hankins* v. *Ingols*, 4 Blackf. 35; Herman Ex. 147, § 17.

Fraudulent transfers are void as to creditors when properly assailed, and if void, of course the thing transferred may be seized as the property of the assignor. *Sanders* v. *Muegge*, 91 Ind. 214. As said in the case cited: "But when the creditor elects in any manner provided by law to avoid the fraudulent conveyance, then such conveyance, as to him, is the same as though it had never had an existence." The text-writers affirm that property fraudulently transferred may be attached. One of them says: "The simulated sale of land or other property, though accompanied by delivery, would not prevent its lawful attachment as the property of the fraudulent grantor." Waples Attachment, 154. Another author says: "A transfer made to hinder, delay, or defraud creditors, as to such creditors, passes no title whatever, the property covered thereby may be attached in the hands of the transferee for the debts of assignor and afterward sold under execution." Kneeland Attachment, § 334. As the property is subject to attachment, the writ becomes a lien and equity may interpose to remove impediments and make the lien perfect. This is the ruling of the best reasoned cases, where the defendants are non-residents, even under the old system, and certainly must be the rule under our system. *Hunt* v. *Field*, 1 Stockton (N. J.) 36; *Sheafe* v. *Sheafe*, 40 N. H. 516; *Ward* v. *McKenzie*, 33 Texas, 297; *Pendleton* v. *Perkins*, 49 Mo. 565; *Scott* v. *McMillen*, 1 Litt. (Ky.) 302. The reasoning in the case last cited is strong and satisfactory and commends itself to our minds as it did to the minds of the court in *Kipper* v. *Glancey*, *supra*, where it was said by BLACKFORD, J., in delivering the opin-

ion of the court: "Where the debtor has absconded, the practice should be the same as in the cases to which we have referred. By absconding from the State, the debtor prevents the proceeding against him at law, and his creditors should be permitted to apply to a Court of Chancery, as where judgments have been previously obtained, or the debtor is deceased."

If the question were an open one, we should not be inclined to yield to the New York decisions so earnestly pressed upon us by counsel, for we regard them as unsound in principle and unsupported by well-grounded authority, and we moreover find that the decisions in that State are in hopeless conflict. The right of a creditor to invoke assistance in a case like the present was held in one of the cases to be perfectly clear, the judge who delivered the opinion saying: "Since the decision in *Rinchey* v. *Stryker*, I consider it no longer an open question, whether when an attachment is issued under the Code of Procedure, the plaintiff in the action obtains such a lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles, in the way of the realization of the lien, in case the plaintiff should recover a judgment." *Greenleaf* v. *Mumford*, 30 How. Pr. 30. The decision of the court is supported by the decisions of that State, and the remarks quoted are abundantly justified, although since that time a departure has apparently been taken. *Rinchey* v. *Stryker*, 28 N. Y. 45; *Kelly* v. *Lane*, 42 Barb. 594; *Thurber* v. *Blanck*, 50 N. Y. 80, see p. 86.

The rule which prevails with us gives a direct road to the end of the controversy, enables a citizen to proceed against the property of an non-resident debtor, while any other produces a multiplicity of actions, and in many instances would make it utterly impossible to reach the property of a non-resident debtor, and would practically nullify our statute providing for notifying non-residents by publication. A rule such as appellant contends for would make it useless to invoke the aid of a court of equity in any case of this character, for if the plaintiff had personal judgment, his legal process would accomplish all that he could ask; if his legal process could not do this, then according to appellant's theory, he is remediless.

We need only say of the other questions presented by the appellant, that they arise upon an erroneous view of the record.

Judgment affirmed.

NOTE BY THE REPORTER.—The same doctrine was held in *Merchants' Nat. Bk.* v. *Paine*, 13 R. I. 592. The court said: "The question is whether a suit in equity can be maintained to enforce payment of a purely legal claim out of equitable assets before the claim has gone to judgment and execution at law. The counsel for the complainant admit that as a rule it cannot; but they contend that the only reason why it cannot is that a court of equity will not interpose until the creditor has exhausted his remedies at law, and because the best evidence that he has exhausted them is a judgment, when recoverable, with execution sued out thereon and returned unsatisfied for want of property. And they also contend, that when this evidence cannot be procured because the debtor is absent or has absconded, leaving no attachable estate, the court will proceed without it upon other satisfactory proof. They cite a Kentucky case in which this view is fully sustained by judicial decisions. *Scott* v. *McMillen*, 1 Litt. 302. They also cite cases which contain favorable *dicta*, some of which appear to have been expressed after careful consideration. *Russell* v. *Clark's Executors*, 7 Cranch. 69, 89; *Miller* v. *Davidson*, 8 Ill. 518, 522; *Greenway* v. *Thomas*, 14 Ill. 271; *Anderson* v. *Bradford*, 5 J. J. Marsh. 69; *Meux* v. *Anthony*, 11 Ark. 411, 418. They cite other cases which hold that a judgment creditor may resort to equity before execution when the debtor being insolvent, the execution would manifestly be of no avail. *Turner* v. *Adams*, 46 Mo. 95, 99; *McDermutt* v. *Strong*, 4 Johns. Ch. 687, 689. And they cite a New York case in which the court expressed itself strongly in support of the jurisdiction in favor of a creditor who was prosecuting a judgment recovered in another State. *McCartney* v. *Bostwick*, 32 N. Y. 53.

"Besides these cases, cited by counsel, we have found other cases which emphatically support the same view, cases indeed from which it appears that the jurisdiction contended for has been unequivocally affirmed in Kentucky, Virginia, Indiana, South Carolina and Missouri. *Scott* v. *McMillen*, *supra*; *Peay* v. *Morrison's Executors*, 10 Gratt. 149; *Kipper* v. *Glancey*, 2 Blackf. 356; *O'Brien* v. *Coulter*, 2 Blackf. 421; *Farrar* v. *Haselden*, 9 Rich. Eq. 331; *Pendleton* v. *Perkins*, 49 Mo. 565. In the last cited case the court, after reviewing the other cases, say, page 568. 'It seems thus to be satisfactorily settled upon authority that when the debtor has absconded, so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, a creditor's bill will lie, in the first instance, and from the necessity of the case. It is analogous to a proceeding to subject the equities of a deceased debtor, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in either of which cases is a personal judgment required.'

"If it were true that the only reason for the rule is the exhaustion of legal remedies, we should not hesitate at all to assert the jurisdiction, for very clearly where no legal remedy exists, none can be exhausted, and the reason for the rule would cease, and with the reason the rule itself. '*Cessante ratione legis, cessat ipsa lex.*' There is however another reason for the rule, namely, that a court of law is the proper tribunal not only to afford a remedy for legal claims, but also to adjudicate them. It seems to be well settled however that a creditor may proceed in equity without first getting judgment at law, if his debtor be dead. And if he can so proceed, if his debtor be dead, there can be no in-

superable reason against his so proceeding while his debtor is alive. *Thompson* v. *Brown*, 4 Johns. Ch. 619; *O'Brien* v. *Coulter*, 2 Blackf. 421; *Steere* v. *Hoagland*, 89 Ill. 264; *Unknown Heirs of Whitney* v. *Kimball*, 4 Ind. 546; *Thorp* v. *Felts*, 6 B. Monr. 6; *Everingham* v. *Vanderbilt*, 12 Hun, 75; *Offutt* v. *King*, 1 McArth. 312. If the claim be one that is peculiarly fit for legal, or peculiarly unfit for equitable cognizance, issues can be framed for jury trial. The jurisdiction ought to be, if it can be, upheld, since without it a debtor may have valuable property and yet escape the payment of his debts. Our conclusion is, so far as this point is concerned, that the suit can be maintained."

Mere insolvency however will not dispense with the necessity for judgment. *Quin* v. *Brown*, 14 R. I. 524. The court said: "The present bill, although describing the respondent Brown as 'formerly of Woonsocket in said county of Providence, commorant of Waltham, Middlesex county, in the State of Massachusetts,' does not aver that he is a non-resident of this State, and that service of legal process cannot be made upon him, but only that he is insolvent, and has not, either in the State of Massachusetts or in the State of Rhode Island, any property or estate which the complainant can reach by attachment or execution, and that a judgment of a court of law could not be satisfied, but would be worthless. These allegations were apparently intended as an excuse for not having obtained a judgment at law, and for not having caused execution to be issued and returned thereon. But as we have remarked already, the reason of the rule requiring judgment to be obtained at law is that legal claims are properly cognizable in the first instance only in courts of law. Mere insolvency therefore does not dispense with the necessity of obtaining a judgment before a resort to equity. Whether or not it will dispense with the necessity for the issue and return of an execution is a question upon which the cases are conflicting. The affirmative is held by *Tabb* v. *Williams*, 4 Jones Eq. 352, 353; *Turner* v. *Adams*, 46 Mo. 95, 99; *McDowell* v. *Cochran*, 11 Ill. 31, 33; *Postlewait* v. *Howes*, 3 Iowa, 366, 383. The negative by *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671, 687; *McElwain* v. *Willis*, 9 Wend. 548, 560, 566; *Screven* v. *Bostick*, 2 McCord Ch. 410, 416; *Parish* v. *Lewis*, Freem. (Miss.) 299, 306."

A simple contract creditor cannot maintain a suit to set aside an assignment for the benefit of creditors on the ground of fraud. *Dawson* v. *Coffey*, 13 Oreg. 513.

See *Baxter* v. *Moses*, *post*.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. KIRK.

(102 Ind. 399.)

Master and servant — course of employment.

A railway section foreman, returning from work with his crew on a hand-car, and meeting a train, transferred the car to a parallel track operated by another company, as had previously been done occasionally, but without the knowledge of either company, and on that track his car was negligently run against a car containing section men of that road, whereby one of the men was injured. *Held*, that the foreman's employers were liable.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and *E. Daniels*, for appellant.

H. N. Spaan, for appellee.

MITCHELL, C. J. There is involved in this record but a single question, the solution of which depends upon the law applicable to the following facts: Eastward from the city of Indianapolis for some miles, the lines of the Pittsburgh, Cincinnati and St. Louis and the Cincinnati, Hamilton and Indianapolis railways lie parallel, and a few feet distant from each other. On the 25th day of August, 1882, Dennis Cronin was a section foreman in the service of the former, and Richard Kirk was, at the same time, in like service for the latter. Each had control of a "crew," a hand-car and the requisite tools for repairing track. The daily routine of Cronin's duty was to meet his crew each morning at 7 o'clock, proceed on the car with men and tools along the line of his section, direct such repairs as were required, and return in like manner with car, tools and men, to the tool-house near the depot, arriving at 6 o'clock, P. M. On the evening of the date mentioned, after quitting work, and while thus returning from the east end of his section, Cronin encountered an engine and train of cars which obstructed his further progress on the line of his employer's road, and he thereupon

*See *Adams* v. *Cost* (62 Md. 264), 50 Am. Rep. 211; *O'Brien* v. *B. & A. R. Co.*, *ante*, p. 279.

directed the car to be transferred from the line of the Pittsburgh, Cincinnati and St. Louis Railway Company to that of the Cincinnati, Hamilton and Indianapolis Railway Company, and while proceeding on the line of the latter, his car was negligently propelled against the car on which Kirk was preceeding homeward with his crew. As a consequence, Kirk was without fault on his part thrown from his car and severely injured.

It was shown that no authority whatever existed for the transfer of the car, nor was there any right in the one railway company to use the line of the other. It appeared that occasionally like use had been made of the line of the Cincinnati, Hamilton and Indianapolis Railway Company by the trackmen of the Pittsburgh, Cincinnati and St. Louis Railway Company, but it does not appear that this was known to or authorized by the officers of either company, nor was the use so frequent as to raise an inference of knowledge.

Kirk brought suit against the Pittsburgh, Cincinnati and St. Louis Railway Company and had a verdict and judgment, and the question is, whether upon the foregoing facts the finding and judgment can be upheld.

The argument is pressed with much force and ingenuity, that because the duties of Cronin and his crew pertained wholly to the appellant's line, and as they had no authority either express or implied to go upon the track upon which the injury occurred, they were at the time within neither the line of duty nor scope of their employment, and that being thus outside of both, the employer is in consequence not liable for their misconduct.

It is further contended that inasmuch as at the time of the injury Cronin and his men had quit work and were proceeding homeward, the transfer of the hand-car for the purpose of avoiding the obstruction was a mere incident to the service in which they were engaged, resorted to for their own convenience, and for that reason the employer is exempt from liability for the resulting injury.

The inquiry in hand embraces the following consideration:

1. Was the servant at the time engaged in prosecuting the business of the master, with authority, either express or implied, to accomplish in some manner an end then in view, and did the wrongful or injurious act have relation to the consummation of such end?

2. Was the manner chosen by the servant, resulting in the injury complained of, so far incident to the end in view as that it was reasonably, under the circumstances, designed for its attainment? or was it for some purpose merely personal to the servant, having no relation to or fitness for the accomplishment of the business in which he was engaged?

Whether a servant in a given case was acting within the scope of his employment, in pursuance of his line of duty, or on his own responsibility, in pursuit of his own pleasure or convenience, must usually depend upon the facts in such case. To undertake to lay down a general rule applicable to all cases would not only be difficult but impossible. But we think thus much may be said, where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this to) even though the means employed were outside his authority, and against the express orders of the master. 2 Thomp. Neg. 889, § 6; Wood Mast. and Serv. 593, 594.

In the case of *Philadelphia, etc., R. Co.* v. *Derby*, 14 How. 468, the question was said to be in all such cases, not whether the servant was obeying or disobeying the master's orders, but whether or not he was at the time acting in the course of his employment, or was in the relation of servant to the master.

Where a servant steps aside from the master's business and does an act not connected with the business, which is hurtful to another, manifestly the master is not liable for such act, for the reason that having left his employer's business, the relation of master and servant did not exist as to the wrongful act; but if the servant continues about the business of the employer, adopts methods which he deems necessary, expedient or convenient, and the methods adopted prove hurtful to others, the master is liable.

The point is well illustrated by the case of *Quinn* v. *Power*, 87 N. Y. 535; s. c., 41 Am. Rep. 392. In that case the pilot of a ferry boat plying between the city of Hudson and the village of Athens, on the Hudson river, when about starting on a regular trip from one point to the other, invited a boatman on board, promising to put him on board his boat, which was lying mid-river and out of the course which it was the pilot's duty to pursue in making his

trip. In attempting to deliver the boatman on his boat the ferry boat collided with a tow attached to the canal boat, and the plaintiff's intestate was thrown from the canal boat into the river and drowned. The case was decided upon the basis that the deviation from the usual and selected route was without the master's authority, and that but for that fact the injury would not have occurred. FINCH, J., in the course of a learned opinion, said: "In deviating from" the prescribed route, "the servants might disregard the instructions or the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route, or pursued another or even a forbidden track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business, even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. * * * They were doing it in a mode and manner perhaps not authorized, and possibly, in some sense, to effect a purpose of their own, but none the less acting within the scope of their employment and engaged in the master's business." *Joel* v. *Morison*, 6 Car. & P. 501, and *Sleath* v. *Wilson*, 9 Car. & P. 607, were cited in that case.

In the first it was held that if a servant, while driving his master's cart on his master's business, make a detour from his usual route, for his own purpose, his master will be liable for damages resulting from the careless driving of the servant while out of his road. The principle decided in the other case was substantially the same.

It has been held by this and other courts, that trackmen and laborers going to and returning from work on a railroad are, during such time, servants of the company, and so far in the line of service that for an injury received while going or coming, through the negligence of a fellow-servant, the company is not liable. *Gormley* v. *Ohio, etc., Ry. Co.*, 72 Ind. 31; *Wilson* v. *Madison, etc., R. Co.*, 18 Ind. 226.

It was part of the section foreman's duty to return with his car, tools and crew over the defendant's track to the tool-house near the depot, as well to observe the condition of the track as to have his car and tools there ready for use at seven o'clock the next morning. The

prescribed route was over the track of the railroad in whose service he was. He had no authority to go upon the other, but encountering an obstacle on the line of his employer, either for his own convenience or possibly to accommodate the other servants of the master, and thus make them better disposed toward it and its service, he judged it convenient or expedient, rather than wait until the appellant's line was cleared, to invade the neighboring line, and by that means he attained the end of delivering the car, tools and crew at their destination. In all this, whatever his motive was, he was pursuing the master's service, that of returning the car, tools and crew to their appointed place, as was his custom and duty, and while he pursued the service, in an unauthorized and possibly forbidden way, he and those with him were, during the time, in the relation of servants to the appellant. Concede that in going off the employer's line he pursued a course which was beyond his authority, his purpose in doing so was nevertheless to accomplish an end within his employment, and reasonably, as he supposed, fitted to reach that end.

The case of *Marier* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 351; s. c., 47 Am. Rep. 793, is not opposed to the conclusion here reached. In that case it appeared that the trackmen built a fire on the right of way of the railway company for the purpose of warming their coffee. They negligently permitted the fire to escape to an adjacent field, and it was held that the company was not liable. The case is rested upon the ground that in preparing their dinner on the right of way the trackmen were engaged exclusively in their own business, as much so as they would have been in doing the same thing in their homes, or as if they had gone into the plaintiff's field and built the fire there for the same purpose. So in the case of *Aycriggs* v. *New York, etc., R. Co.*, 30 N. J. L. 460, relied on by appellant. It appeared in that case that the captain of a ferry boat which was lying at the wharf, seeing a barge on fire in the river, without any orders to do so, went out into the river and undertook to tow the burning barge up the stream. In doing this the burning barge came in contact with another boat to which fire was communicated and which was damaged. It was held that going in aid of the burning barge was outside of the scope of the captain's employment and the master was not liable. The case is like that of a coachman who should take his master's coach and horses from his stable without authority and go in pursuit of an object not connected with his master's service. There would be no liability of the master.

In this case it cannot be said that the servant had stepped aside from the master's service for a purpose of his own. The most that can be said of it is that in accomplishing an end within the scope of his employment he adopted a method wholly unauthorized, which was possibly resorted to to accommodate himself and those under him; but whatever the motive may have been, since the end aimed at was, as averred in the complaint and as the judgment must have found, within the line of service, it cannot be said upon the evidence that he was acting without authority in a matter not connected with his employment.

We think that in ruling on the complaint and in overruling the motion for a new trial, no error was committed, and accordingly the judgment is affirmed with costs.

Judgment affirmed.

AVERY v. DOUGHERTY.

(102 Ind. 443.)

Agency — lease — execution.

A lease reciting that it is made by "M., agent of D.," and signed in the same manner, is the contract of the principal.*

ACTION on notes. The opinion states the case. The plaintiff had judgment below.

J. V. Mitchell and *J. F. Cox,* for appellants.

J. H. Jordan and *O. Matthews,* for appellee.

ELLIOTT, J. In the promissory notes, upon which the complaint of the appellee is founded, the description of the payee is Oliver R. Dougherty. The answer to the complaint is in two paragraphs, but as they are substantially the same, it is only necessary to give a synopsis of one of them. It is alleged that the sole consideration of the notes was the execution of a lease by the plaintiff to the defendants Monroe and Madison Avery; that in the lease the plaintiff covenanted with the defendants that they should have the

* See *Byington* v. *Simpson* (134 Mass. 169), 45 Am. Rep. 314.

peaceable, quiet, and undisturbed possession and enjoyment of the land therein described for the term of three years; that the defendants entered into the possession of the land; that prior to the time the notes sued on became due the plaintiff wrongfully, and without the knowledge or consent of the defendants, entered upon the land, cut down and worked into saw-logs and staves a great number of trees; that the plaintiff and his servants entered upon the land, at seasons when the ground was soft and spongy, and also after the defendants had planted corn, with horses and wagons, and tramped and packed the ground, thereby injuring the crops of the defendants; that the plaintiff left the tops of the trees cut down by him lying on the ground where they fell; that the defendants were compelled to remove these tree tops at an expense of $500; that by reason of the wrongful entry and unlawful acts of the plaintiff, the defendants were deprived of the possession of the demised premises and greatly damaged, to-wit, in the sum of $500.

It is alleged that Jesse Avery executed the notes as the surety of Madison and Monroe Avery. The conclusion and prayer of the answer is substantially as follows: Wherefore defendants say that the consideration of the notes has failed, and they pray that the damages so sustained by said Madison and Monroe Avery may be recouped, and they have judgment for the money paid upon the notes by them, together with all other proper relief.

The lease is not well drawn, and is evidently the work of an unskilful person, for many of the usual and appropriate provisions of a lease are absent. There is however enough in the instrument to fix the term, describe the property demised, and designate the amount of rent to be paid by the tenant; there are covenants on the part of the lessee to pay rent, to take care of the premises, and make repairs. There are no express covenants on the part of the lessor, nor is any right of entry reserved. Reference is made to the notes sued on; it is recited that they were given for the rent of the demised premises, and dates, amounts and times of maturity are stated. The introductory clause of the lease reads thus: "This agreement, made this 25th day of December, 1880, between Randolph Marshall, agent of Oliver Dougherty, guardian of his minor children, and Madison Avery and Monroe Avery," and the instrument is signed "Randolph V. Marshall, agent of O. R. Dougherty."

The appellee's counsel assert that the lease is executed by Marshall, and not by Dougherty, and that the allegation that it was

executed by the latter is overthrown by the exhibit. It is true that the allegations of a pleading are controlled by the statements of the instrument upon which is is founded. *Hines* v. *Driver*, 100 Ind. 315, and authorities cited, p. 317. It is also true that mere descriptive words are regarded as simply describing the person. *Jackson School Tp.* v. *Farlow*, 75 Ind. 118; see authorities cited, p. 123. This doctrine applies to leases as well as to other instruments. Wood Land. and Ten. 203. The rule is firmly engrafted in our law, but it is not easy to find any real ground for it in this country, where there are no titles, designating rank or condition in life. In England there was reason for the rule; here there is none. The better doctrine would be that the words annexed to the name may be explained by extrinsic evidence; but the rule has been too long and too firmly settled to be shaken now. While accepting the general rule to be that stated, the American authorities agree, that if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited: "That the said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery." There are other provisions in the instrument clearly showing that Marshall executed the lease as the agent of Dougherty, and we have no doubt that it should be treated as having been executed by him, and that the improper description of the lessor in the introductory clause of the lease must be attributed to the unskilfulness of the draftsman of the instrument.

[Other questions omitted.]

Judgment affirmed.

CUNNINGHAM v. EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY.

(102 Ind. 478.)

Damages — by fire by negligence — offset of insurance.

Where buildings are burned through the negligence of another, the owner's recovery is not subject to diminution on account of insurance thereon.

ACTION for damages by negligent fire. The opinion states the case. The defendant had judgment below.

W. H. DeWolf, S. N. Chambers, J. E. McDonald, J. M. Butler and *A. L. Mason*, for appellants.

A. Iglehart, J. G. Williams, F. W. Viehe, J. E. Iglehart and *R. G. Evans*, for appellee.

HOWK, J. This is a suit by the appellants, James H. and James A. Cunningham, as plaintiffs, against the appellee, the Evansville and Terre Haute Railroad Company, as sole defendant. The object of the suit was to recover damages for the destruction of the appellants' starch and glucose works by fire, communicated thereto, as alleged, by and through the negligence of the appellee, and without any contributory negligence on the part of the appellants. The complaint of the appellants was in three paragraphs. In the first paragraph, appellants alleged that the appellee negligently failed to keep its engines used on its railroad track adjacent to their works, supplied with suitable spark-arresters, but suffered them to become old, worn out and in bad repair, so that coals of fire escaped from such engines, and without the appellants' fault, communicated to and destroyed their works.

In the second paragraph of their complaint appellants alleged, in substance, that appellee negligently overloaded its trains of cars, used on its railroad track adjacent to the appellants' works, so that the engines hauling such trains emitted sparks, and coals of fire, which without appellants' contributory fault, communicated fire to their works, and they were thereby consumed and destroyed.

In the third paragraph of their complaint appellants alleged, in brief, that by the general negligence of the appellee in the construc-

tion, management and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrers to the second, third and fourth paragraphs of appellee's answer.

The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each of the second, third, fourth and fifth paragraphs of answer is substantially the same, namely, that the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of $50,000, and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of $35,224.09. Upon this basis of facts, the appellee alleged, in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them; that by means of such payment of such insurance money, the several insurance companies became and were subrogated to all the rights of the appellants, in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action, and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer, that after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised and agreed upon the amount of such loss and damage complained of herein, at the sum of $68,375.65, which was a sum greater than the damage suffered; that thereupon the several insurance companies paid, as and for the

sum insured upon such property, the aggregate sum of $35,224.09, whereby all rights of action as to such sum became and were transferred to such insurance companies, and so the appellee said, that as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to-wit, at $68,375.65; and that upon such insurance and damage, the insurance companies paid the appellants the amount insured, to-wit, $35,224.09; whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action for the causes set forth in their complaint.

It will be observed that the appellee has not controverted in either of these paragraphs of answer any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer the appellee concedes that the appellant's property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars that the engines hauling the same emitted sparks and coals of fire, and (3) in the construction, management and use of its engines and trains so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it for the damages resulting from its negligent destruction of their property (1) was wholly barred by reason of the fact that they had received from certain insurance companies, in which they had insured such property against loss by fire, certain sums of money, amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damages sustained by them, and (2) was barred in part as to the amount of the insurance money so received by them for the burning and loss of such property from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

tion, management and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrers to the second, third and fourth paragraphs of appellee's answer.

The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each of the second, third, fourth and fifth paragraphs of answer is substantially the same, namely, that the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of $50,000, and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of $35,224.09. Upon this basis of facts, the appellee alleged, in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them; that by means of such payment of such insurance money, the several insurance companies became and were subrogated to all the rights of the appellants, in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action, and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer, that after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised and agreed upon the amount of such loss and damage complained of herein, at the sum of $68,375.65, which was a sum greater than the damage suffered; that thereupon the several insurance companies paid, as and for the

sum insured upon such property, the aggregate sum of $35,224.09, whereby all rights of action as to such sum became and were transferred to such insurance companies, and so the appellee said, that as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to-wit, at $68,375.65; and that upon such insurance and damage, the insurance companies paid the appellants the amount insured, to-wit, $35,224.09; whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action for the causes set forth in their complaint.

It will be observed that the appellee has not controverted in either of these paragraphs of answer any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer the appellee concedes that the appellant's property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars that the engines hauling the same emitted sparks and coals of fire, and (3) in the construction, management and use of its engines and trains so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it for the damages resulting from its negligent destruction of their property (1) was wholly barred by reason of the fact that they had received from certain insurance companies, in which they had insured such property against loss by fire, certain sums of money, amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damages sustained by them, and (2) was barred in part as to the amount of the insurance money so received by them for the burning and loss of such property from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

tion, management and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrers to the second, third and fourth paragraphs of appellee's answer.

The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each of the second, third, fourth and fifth paragraphs of answer is substantially the same, namely, that the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of $50,000, and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of $35,224.09. Upon this basis of facts, the appellee alleged, in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them; that by means of such payment of such insurance money, the several insurance companies became and were subrogated to all the rights of the appellants, in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action, and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer, that after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised and agreed upon the amount of such loss and damage complained of herein, at the sum of $68,375.65, which was a sum greater than the damage suffered; that thereupon the several insurance companies paid, as and for the

sum insured upon such property, the aggregate sum of $35,224.09, whereby all rights of action as to such sum became and were transferred to such insurance companies, and so the appellee said, that as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to-wit, at $68,375.65; and that upon such insurance and damage, the insurance companies paid the appellants the amount insured, to-wit, $35,224.09; whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action for the causes set forth in their complaint.

It will be observed that the appellee has not controverted in either of these paragraphs of answer any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer the appellee concedes that the appellant's property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars that the engines hauling the same emitted sparks and coals of fire, and (3) in the construction, management and use of its engines and trains so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it for the damages resulting from its negligent destruction of their property (1) was wholly barred by reason of the fact that they had received from certain insurance companies, in which they had insured such property against loss by fire, certain sums of money, amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damages sustained by them, and (2) was barred in part as to the amount of the insurance money so received by them for the burning and loss of such property from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

tion, management and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrers to the second, third and fourth paragraphs of appellee's answer.

The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each of the second, third, fourth and fifth paragraphs of answer is substantially the same, namely, that the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of $50,000, and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of $35,224.09. Upon this basis of facts, the appellee alleged, in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them; that by means of such payment of such insurance money, the several insurance companies became and were subrogated to all the rights of the appellants, in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action, and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer, that after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised and agreed upon the amount of such loss and damage complained of herein, at the sum of $68,375.65, which was a sum greater than the damage suffered; that thereupon the several insurance companies paid, as and for the

sum insured upon such property, the aggregate sum of $35,224.09, whereby all rights of action as to such sum became and were transferred to such insurance companies, and so the appellee said, that as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to-wit, at $68,375.65; and that upon such insurance and damage, the insurance companies paid the appellants the amount insured, to-wit, $35,224.09; whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action for the causes set forth in their complaint.

It will be observed that the appellee has not controverted in either of these paragraphs of answer any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer the appellee concedes that the appellant's property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars that the engines hauling the same emitted sparks and coals of fire, and (3) in the construction, management and use of its engines and trains so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it for the damages resulting from its negligent destruction of their property (1) was wholly barred by reason of the fact that they had received from certain insurance companies, in which they had insured such property against loss by fire, certain sums of money, amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damages sustained by them, and (2) was barred in part as to the amount of the insurance money so received by them for the burning and loss of such property from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

The paragraphs of appellee's answer, the substance of which we have given, proceed upon the theory that although the appellant's property, without contributory fault on their part, was consumed and destroyed by and through the negligence of the appellee, they cannot recover the damages occasioned by such destruction of their property of or from the appellee, if it appear they were indemnified for such damages by contracts of insurance against loss by fire, unless the amount of damages exceed such indemnity, and then only to the extent of such excess; in other words, the appellee claims in its answer that to the extent the appellants were indemnified for their damages resulting from the destruction of their property by fire by their contracts of insurance against loss by fire, it, the appellee, is exempt from liability to them for such damages, although the destruction of their property by fire was caused by and through its negligence, without their contributory fault. These positions cannot be maintained. The contracts of the appellants for the insurance of their property, with the insurance companies, and their subsequent conduct in relation thereto, are matters in which the appellee, as the wrong-doer, had no concern, and which do not affect the measure of its liability. So the law seems to be uniformly settled elsewhere, and we know of no sufficient reason for adopting a different rule of decision in this State. *Weber* v. *Morris and Essex R. Co.*, 35 N. J. L. 409; s. c., 10 Am. Rep. 253; *Clark* v. *Wilson*, 103 Mass. 219; s. c., 4 Am. Rep. 532; *Hayward* v. *Cain*, 105 Mass. 213; *Perrott* v. *Shearer*, 17 Mich. 48; *Merrick* v. *Brainard*, 38 Barb. 574; *Peoria M. & F. Ins. Co.* v. *Frost*, 37 Ill. 333; *Connecticut M. Life Ins. Co.* v. *New York, etc., R. Co.*, 25 Conn. 265; *Rockingham Mut. Fire Ins. Co.* v. *Bosher*, 39 Me. 253; *Carpenter* v. *Eastern Transp. Co.*, 71 N. Y. 574.

The appellants claimed that their property had been consumed and destroyed by and through the actionable negligence of the appellee. In such a case they would be entitled to recover their entire loss from the appellee; and the fact that the insurance companies in which their property was insured had paid them the amount of such insurance, we think, did not constitute any defense whatever to the appellant's action. We are of opinion therefore that the trial court erred in overruling the appellants' demurrers to the second, third and fourth paragraphs of appellee's answer.

[Minor consideration omitted.]

In speaking of the claim of the wrong-doer to the benefit of insurance money received by the injured party, a recent writer on the law of damages says: "There can be no abatement of damages on the principal or partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta.* * * * Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." 1 Sutherland Dam. 242.

The doctrine here declared was recognized, approved and acted upon by this court in *Sherlock* v. *Alling*, 44 Ind. 184. In that case a similar defense was interposed to that pleaded by the appellee in the second, third and fourth paragraphs of its answer in the case in hand. In considering this defense the court there said: "It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from or connected with the act causing the death—benefits, which it is fair to presume would have been realized at a future day, without the aid of their wrongful act." So in *Ohio, etc., Ry. Co.* v. *Dickerson*, 59 Ind. 317, it was held by this court that the fact that the salary of a person injured through the negligence of the defendant is paid by his employer during the time he is disabled by such injury cannot mitigate the damages such injured party may recover in an action therefor.

In their exhaustive briefs of this cause the appellants' learned counsel have ably discussed a number of alleged errors of law occurring at the trial and duly excepted to. But as these errors may not occur again, upon a new trial of this cause, we need not and do not extend this opinion in the consideration and decision of the questions thereby presented.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrers to the second, third and fourth paragraphs of the answer, etc.

Judgment reversed.

NIBLACK, J., expressed no opinion in this case.

GIBSON v. SEYMOUR.

(102 Ind. 485.)

Will — devise for life — death of devisee before testator.

A wife devised all her property to her husband for life, and provided that if he survived her, the same should go at his death to her step-daughter. The husband died before the wife. *Held*, that the wife was intestate.

PARTITION. The opinion states the case.

D. D. Dykeman and *D. C. Justice*, for appellant.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellees.

BLACK, C. On the 13th of November, 1879, Ruth A. Burrow, then the wife of Joseph M. Burrow, with whom she resided at Logansport, in this State, executed her last will and testament, whereby she made dispositions of property as follows:

"*First.* I direct that all my just debts and funeral expenses shall be promptly paid, as soon as possible after my death.

"*Second.* I hereby bequeath and devise to my beloved husband, Joseph M. Burrow, all my property, both real and personal, of every description whatever, for and during his natural life.

"*Thirdly.* At the death of my said husband, should he outlive me, or as soon as may be after my death without the sacrifice of property, I desire that a suitable monument or monuments be put to all the graves; that they may be marked in an unostentatious manner: Harriet Farlow, who died January 30th, 1873; Mary Taintor, who died June 7th, 1873; Mahala Danforth, who died May 29th, 1879; Joseph M. Burrow and Ruth A. Burrow. The names may all be put on one monument if my executor and legatees are so disposed, and no use shall be made of my property or no income ap-

propriated to personal use, until such monument or monuments shall be erected.

"*Fourthly.* If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provisions of article third. If I survive my husband, all or any thing I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson. I promised $20 to the W. F. M. Society; I have only paid $5. This I consider a debt, and desire paid; also, desire that a locket worth at least $5 be purchased for my namesake, and my picture be put in it, Ruth A. Washburn, if I have not given it previous to my death."

She appointed John F. Burrow as executor of said will. Her said husband died on the 17th of March, 1880, and she died on the 29th of July, 1880. Her said will was duly admitted to probate.

At the date of the execution of said will the testatrix was the owner in fee-simple of certain real estate in Logansport, and she still owned it at her death. She was the second wife of her said husband, by whom she had no children.

This was an action for petition of said real estate, instituted by the appellee, Charles E. Seymour, one of the heirs at law of said testatrix, against another heir at law and her step-children named in the will; and the question involved is, whether said real estate is the property of the appellant, said Harriet E. Gibson, or as the court below decided, the property of the heirs at law of the testatrix.

By the second clause of the will the property in question was devised to the husband of the testatrix for his life. His death before that of the testatrix prevented the taking effect of this devise. By the second provision of the fourth clause she gave all the property of which she became possessed through his death to her step-children.

Other portions of the will directed the payment of her debts, the erection of a monument or monuments, the payment of what she had promised to the W. F. M. Society, and the purchase of a locket for her namesake; but the only disposition made of the real estate in question, except to her husband for his life, was that contained in the first portion of the fourth clause, as follows: "If my hus-

band survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provisions of article third."

The language is plain; its meaning is obvious. We are not at liberty to qualify or control such language in a will by conjecture or doubt arising from extraneous facts.

The devise of the real estate in question to the appellant is contingent in form, and no transposition of the language of the will, which does not modify the meaning, can be made so as to render the devise other than a contingent one.

We may conjecture that the testatrix failed through inadvertence to express her intention as she would have done if her attention had been called by another person to the matter about which the parties to this suit are now through it contending. But courts can no more make a portion of a will than they can make an entire will.

We cannot say that the testatrix by her will gave the real estate in question to the appellant in fee simple merely subject to the life-estate previously given to the husband of the testatrix. She plainly made the devise of this real estate to the appellant contingent upon an event which did not happen.

She made no expression of intention in regard to this property in the event that she should survive her husband; and there is nothing left for us but to conclude with the court below, that as to this property she died intestate.

PER CURIAM. Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellant.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. We have carefully studied the briefs originally filed and those filed on the petition for a rehearing, and cannot find any reason for departing from the rule declared in our former opinion.

The rights of the appellant to the property she claims depend upon the construction of the will of her step-mother, Ruth A. Burrow. The will, set out in our former opinion, devises to the appellant's father and the testatrix's husband an estate for life in her property, makes provision for the payment of debts, for the erection of monuments, and for the appointment of an executor. The

only provisions in the will which directly affect the appellant are the following:

"*Fourthly.* If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well-beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third. If I survive my husband, all or any thing I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson."

If it were not for the earnestness and apparent sincerity of counsel, we should not feel justified in devoting additional time or space to the question, for to our minds it is clear that the provisions of the will are not doubtful or obscure. In one event only is Harriet E. Gibson to take the property of her step-mother, the testatrix, and that is in the event that the husband of the testatrix should survive her. We cannot inquire why the step-mother chose to make the devise to her step-child depend upon the contingency of the father's survival. It is not the duty of the courts, nor is it within their power to search for the reasons which influenced a testator to annex a condition to a devise; their duty is to ascertain whether there is a contingency, and its character and effect. The devise to Mrs. Gibson is made to depend upon the contingency of her father outliving his wife, and the courts cannot destroy the force of a clause so clearly and fully framed as the one before us.

There is no absolute devise to Mrs. Gibson, and unless the court inserts such a devise in the will, she cannot take the property of the testatrix. Not only is there no absolute devise, but there is a conditional one, and the contingency is the event of the survival of the husband of the testatrix. It is a familiar rule that the express mention of one thing implies the exclusion of all others, and under this rule it must be held that expressly making the devise depend upon the happening of a given event excludes the inference that the devise was intended to be an absolute one.

Mrs. Gibson can only take as the will provides, and as the will makes the devise depend upon a contingency, she cannot take absolutely. She can claim only under the will, for she is not an heir, and can only take upon the condition expressly created by the will, and as that condition failed, so also did her claim as sole devisee.

We are bound to adhere to the words of the will unless there is

doubt, confusion or obscurity, and there is nothing of the kind here. Redfield says there is no rule of construction "of more universal application, both here and in England, than that the plain and unambiguous words of the will must prevail, and are not to be controlled or qualified, by any conjectural or doubtful constructions, growing out of the situation, circumstances, or condition, either of the testator, his property, or his family." 1 Redf. Law of Wills, 430.

Another author says: "Devises, limited in clear and express terms of contingency, do not take effect, unless the events upon which they are made dependent happen." 1 Jarm. Wills (4th Am. ed.), 743.

At another place this author says: "An estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what may be conjectured would have been the testator's actual meaning, if his attention had been drawn to these consequences." 1 Jarm. Wills, 744.

The authorities are not divided upon the proposition that courts cannot, except in the clearest cases, change by transposition, alteration, subtraction or substitution, the words of a will, but must take them as they are written." *Shimer* v. *Mann*, 99 Ind. 190, see authorities cited, pp. 195, 196; s. c., 50 Am. Rep. 82; *Rupp* v. *Eberly*, 79 Penn. St. 141; *Yearnshaw's Appeal*, 25 Wis. 21.

The language of the will gives Mrs. Gibson the whole estate only upon the condition that the husband of the testatrix survives her. No precise form of words is necessary to create a condition. As said in *Stilwell* v. *Knapper*, 69 Ind. 558; s. c., 35 Am. Rep. 240: "The word 'condition' is not necessary to the creation of a condition. Any words that convey the proper meaning will create a condition;" see page 570. There are many cases illustrating this general doctrine and applying it to cases like the present. In the well considered case of *Yearnshaw's Appeal*, *supra*, the question was considered and decided as we have decided it.

In the case of *Illinois Land & Loan Co.* v. *Bonner*, 75 Ill. 315, it was said: "Did Bogle and Trulear take any thing under the will? We are of the opinion they did not for the reason that the contingency upon which they were to take never happened. They were to take only 'in case both said sister and brother should die without issue prior to attaining the ages of eighteen and twenty-one

respectively.' The sister and brother did both die without issue, but they did not both die prior to their attaining those ages respectively. One did, and the other did not, the brother dying before reaching the age of twenty-one, but the sister, not until after having reached the age of eighteen. The terms of this devise over are clear and free from the least ambiguity. It seems plain that the devise is contingent upon the fact of both Rosalie and Percy dying before reaching the ages of eighteen and twenty-one respectively. * * * The testatrix did not in her will provide for the events that have happened, that is, of her sister dying over eighteen and the brother under twenty-one. In such case, the court will not provide for the unforeseen events. 'Where the testator, in the disposition of his property, overlooks a particular event, which had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause; conceiving it would be too much like making a will for the testator, rather than construing that already made.'" 2 Roper Legacies, 1464.

We have perhaps cited more authorities upon this branch of the discussion than necessary, but we have been induced to do so by the zeal and earnestness of counsel.

Counsel for appellants complain that their authorities were not discussed, and infer that they were not considered: Their inference is erroneous; it does not follow because authorities are not discussed in detail, in the opinion, that they have not had consideration.

Many authorities are cited to the effect that courts must ascertain and give force to the intention of the testator, and we yield undoubting assent to this familiar and rudimental doctrine, but we cannot perceive that it aids counsel, for all the authorities agree that the intention is to be gathered from the language of the will; that it must be the testator's intention as thus manifested that is given effect, and not the views of the court as to what the will should have provided, and that the court cannot supply words to give the instrument a different meaning from that which the language used ordinarily conveys.

It is contended that the intention of the testatrix was to make a disposition of her entire estate, and therefore that she intended to make an absolute devise to Mrs. Gibson. There is in this argument a plain fallacy; the conclusion does not follow from the pre-

mise, and the premise is not well assumed. The words of the will give an estate to Mrs. Gibson on a contingency, and not otherwise, and it cannot be assumed that the testatrix meant the reverse of what she says. Granting however the justice of the assumption, the conclusion does not follow, because the intention was not to dispose of the estate to Mrs. Gibson, except upon a certain event, and the inference is that what was not so disposed of went to the heirs. *Waugh* v. *Riley*, 68 Ind. 482. The presumption in such a case as this is in favor of the heirs, and where an estate is devised to a stranger upon a contingency, the contingency must happen, or the heirs will succeed to the estate of their ancestor. The general rule upon this subject is thus stated: "It is a well known maxim that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." 1 Jarm. Wills, 465; *Rupp* v. *Eberly, supra.*

We are referred to the cases of *Allen* v. *Mayfield*, 20 Ind. 293; *Richmond* v. *Vanhook*, 3 Ired. Eq. 581; *Dunlap* v. *Dunlap*, 4 Desaus. 305; *Coleman* v. *Hutchenson*, 3 Bibb, 209, in support of the proposition that "a legacy to one person for life with remainder to another does not lapse upon the death of the first taker during the testator's life," but these cases, it is evident, cannot exert any influence here, for the question is not whether the devise to the husband lapsed, but whether the contingency upon which Mrs. Gibson was to take ever happened?

We are asked to construe the will "as if Joseph M. Burrow," the husband, "had not been named," but this we cannot do, for the words of the will are: "If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well-beloved step-daughter, Harriet E. Gibson." To strike out the provision creating the contingency would make the will express a meaning entirely different from what its framer intended. The case of *Jackson* v. *Hoover*, 26 Ind. 511, is essentially different from the present, for there the persons who claimed the estate were the children of the testator. It appeared that he meant to make the provision for them all, and there was no language creating a condition as there is here.

The case of *Womrath* v. *McCormick*, 51 Penn. St. 504, is not in point. There the question was whether the remainder was vested or contingent, there was no question as to whether the devise was or

was not a conditional one. The decision was put upon the doctrine of Mr. Fearne, that "It sometimes happens that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession. Here no estate at all is devised, except upon conditiom that the husband shall survive the testatrix. The question is not when a remainder shall vest, but whether, if the designated contingency does not happen, there is any devise at all. Redfield defines a conditional devise thus: "A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event." 2 Redf. Wills, 283. This describes the devise contained in the will under examination, for the taking effect of the bequest depends upon the contingency of the husband of the testatrix surviving her.

The will does not, as is argued, simply fix the time when the devise shall take effect, but it provides that it shall not take effect at all until the happening of the designated contingency. Until that contingency does happen no estate passes. A standard author says: "Whenever it appears that the happening of an event, or the performance of an act, was intended to operate as a condition to precede the vesting of a legacy or devise, it is essential that the event happens or the act is done, since no interest will previously vest in the legatee or devisee, as has been shown in the tenth chapter of this treatise." 1 Roper Legacies, 750; 2 Powell Devises, 251.

Petition overruled.

Brechbill v. Randall.

(103 Ind. 523.)

Constitutional law — State law regulating sale of patent rights.

A State statute requiring vendors of patent rights to file with the county clerk an authenticated copy of the letters, with an affidavit that they are genuine and have not been revoked or annulled and that the vendors have authority to sell, is valid.*

* See *Cranson* v. *Smith* (37 Mich. 309), 26 Am. Rep. 514.

THE opinion states the case.

P. V. Hoffman and *N. L. Agnew*, for appellant.

W. L. Penfield, for appellees.

ELLIOTT, J. If the statute requiring persons who sell, or offer for sale, patent rights to file with the clerk of the proper county a duly authenticated copy of the letters patent, and an affidavit that the letters are genuine and have not been revoked or annulled, and that he has authority to sell the right patented, is valid, this judgment must be affirmed; otherwise it must be reversed.

In our opinion the statute is valid, for the reason that in enacting it the legislature exercise a police power resident in the State. The power to make police regulations for the protection of its citizens against fraud and imposition is not taken from the States by the Federal Constitution or by any national statute. It has indeed been authoritatively settled that the national legislature cannot exercise police powers for the protection of the inhabitants of a State; this is a domestic matter to be governed and regulated by State laws. *Western Union Tel. Co.* v. *Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; *U. S.* v. *Dewitt*, 9 Wall. 41; *U. S.* v. *Reese*, 92 U. S. 214; *Munn* v. *Illinois*, 94 U. S. 113; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Civil Rights* cases, 109 U. S. 3.

The State is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse. *Western Union Tel. Co.* v. *Pendleton, supra; Sherlock* v. *Alling*, 93 U. S. 99; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Munn* v. *Illinois, supra; Woodruff* v. *Parham*, 8 Wall. 123; *Slaughter House* cases, 16 Wall. 36; *Cooley* v. *Board, etc.*, 12 How. 299; *Mayor, etc., of New York* v. *Miln*, 11 Peters, 102; *State* v. *Addington*, 77 Mo. 110.

In the case of *Patterson* v. *Kentucky*, 97 U. S. 501, the doctrine stated was applied to the case of a patented article, and the principle declared in that case rules here. The doctrine of the case just cited was fully approved in *Fry* v. *State*, 63 Ind. 552 (see opinion, 565), and must be deemed the law of this State.

We need not inquire whether a statute discriminating against patented articles would, or would not be valid, for that is not here

the question. We are not therefore required to review the cases of *Crittenden* v. *White*, 23 Minn. 24; s. c., 23 Am. Rep. 676; *Hollida* v. *Hunt*, 70 Ill. 109; s. c., 22 Am. Rep. 63; *Cranson* v. *Smith*, 37 Mich. 309; s. c., 26 Am. Rep. 514. Here there is no discrimination, for the statute simply prescribes a method by which our citizens can secure protection against fraud. The requirement that a record shall be made is not an unreasonable one, nor does it impede the free course of commerce; it simply compels an exhibition of the source of title and a description of the thing offered for sale. The intangible character of the thing put into market, and its peculiar nature, distinguish it from other articles of commerce, and these make necessary laws of a peculiar character. It is the character of the commodity that makes necessary a law applying particularly to it, and not to articles of commerce in general, and in enacting a statute particularly applicable to a thing of a peculiar nature, there is no discrimination and no obstruction to the free course of commerce. Honest dealers cannot be harmed by such a law, and if dishonest ones are, all the greater the merit of the law.

The answer avers that no copy of the letters-patent was filed, and that no affidavit was made and filed, and it further alleges that the words "given for a patent" were not written in the note. We are not required to decide what the result would be if the answer averred no more than that the words "given for a patent" were not written in the note, for the other allegations in themselves make the answer good. We need not therefore determine whether the decision in *Helm* v. *First Nat'l Bank*, 43 Ind. 167; s. c., 13 Am. Rep. 395, is or is not to be regarded as correctly expressing the law; but it is proper to say that its force and reasoning are much shaken by the later cases. The decision in *Grover & Baker Sewing Machine Co.* v. *Butler*, 53 Ind. 454; s. c., 21 Am. Rep. 200, was based entirely on the case of *Ex parte Robinson*, 2 Biss. 309, and as that case has been overthrown by the decision of the court of supreme authority, the case built upon it must also go down. We must yield to the judgment of the court of last resort, and that requires us to declare that the case of *Grover & Baker Sewing Machine Co.* v. *Butler*, *supra*, is virtually overruled by the decisions of the Supreme Court of the United States. This result was really established by the decisions in *Fry* v. *State*, *supra*, and *Toledo Agricultural Works* v. *Work*, 70 Ind. 253, although not explicitly announced.

Judgment affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

JOHNSON v. WILKINSON.

(139 Mass. 3.)

Statute of frauds — license — occupancy of hall.

An oral agreement to let a public hall for four specified days at a certain price for each day, is not a sale of an interest in land, and not within the statute of frauds.

ACTION for breach of agreement to let hall. The opinion states the case. The defendant had judgment below.

F. S. Hesseltine, for plaintiff.

G. M. Stearns, for defendant.

MORTON, C. J. There was evidence tending to show that the defendant, who was the owner of a hall, entered into an oral contract with the plaintiff, by which he agreed to permit the plaintiff to use the hall for dancing parties on the afternoons of four holidays, Thanksgiving, Christmas, Washington's Birthday, and Fast Day, at a stipulated price for each afternoon. The Superior Court directed a verdict for the defendant, upon the ground that this contract was within the statute of frauds, being a contract for the sale of an interest in land. Pub. Stats., chap. 78, § 1, cl. 4. The question is,

whether it was such a contract, or merely a contract for a license to the plaintiff to enter and use the hall for the purpose contemplated.

A license is a permission or authority to enter the land and do certain acts, or series of acts, the parties not intending to convey any interest in the land; and it is well settled that such a license need not be in writing, under the statute of frauds. Thus a license to enter land and to cut timber, or to gather the growing crops, is valid, though not in writing. *Whitmarsh* v. *Walker*, 1 Metc. 313. So an agreement for a seat in a theater, or other place of amusement, is a license merely. *McCrea* v. *Marsh*, 12 Gray, 211; *Burton* v. *Scherpf*, 1 Allen, 133. So ordinarily, an agreement for lodgings in a hotel or boarding-house, though the rooms the boarder is to occupy are designated, does not create an interest in land, but is merely a license. *White* v. *Maynard*, 111 Mass. 250; s. c., 15 Am. Rep. 28.

In the case before us, it seems to us that the contract has the elements of a license rather than of a contract for the sale of any interest in land. The use of the hall by the plaintiff was not to be continuous, but only occasional, and for a few hours on four separate days. He was not to have the exclusive occupation and control of it; the key was never delivered to him, but remained with the defendant, who on the afternoons it was occupied under the contract, opened, lighted and closed it. We think the defendant would remain all the time in the legal possession of the land; that the plaintiff was to occupy it merely as licensee, and would acquire under the contract no interest in the land. It is like the ordinary case of hiring a hall for a night, which does not create a lease, but the hirer occupies under a license.

Regarding the contract in this case as a contract for a license, it is true that the defendant had the power to revoke the license, and the plaintiff could not compel the defendant to give him the use of the hall. But if in revoking it the defendant violated his contract he is responsible for any damages sustained by the plaintiff by reason of such breach of contract. *McCrea* v. *Marsh*, and *Whitmarsh* v. *Walker*, *ubi supra*.

Judgment for plaintiff.

DODD v. WITT.

(139 Mass. 63.)

Deed — boundary — road — presumption.

Where a grant of land is bounded "on a road," the presumption that it conveys to the center may be rebutted by proof of the establishment of monuments, and fencing and occupancy in accordance therewith.

ACTION to recover land. The opinion states the case. The plaintiff had judgment below.

S. P. Thayer, for tenants.

M. E. Couch and *C. J. Parkhurst*, for demandant.

FIELD, J. The demanded premises are a strip two rods wide on the westerly end of the lot described in the demandant's deed. The demandant derives title from Reuben Whitman, who in May, 1886, conveyed the premises to Thomas H. Lidford by a description, as follows: "Commencing on the road at the south-east corner of the land that I gave D. H. Raymond a bond to convey; thence west 22 degrees 30 minutes north ten rods; thence south 22 degrees 30 minutes west four rods; thence east 22 degrees 30 minutes south ten rods, thence south on the road to the place of beginning." The descriptions in the mesne conveyances are substantially the same. The road was four rods wide, and Reuben Whitman, when he executed his deed, owned the fee of it. The deed therefore conveyed the land to the center line of the highway. *Peck* v. *Denniston*, 121 Mass. 17; *O'Connell* v. *Bryant*, 121 Mass. 557.

The tenants contended that by the construction of the deed, the side lines of the demanded premises extended ten rods from the center line of the highway, or eight rods from the westerly side of the highway; or if this were not the true construction, that there was an ambiguity in the description; and they offered "John Lidford, father of said Thomas H. Lidford, as a witness to prove that at the time of the execution of the above-mentioned deed from Reuben Whitman to Thomas H. Lidford, the said witness was present; and that said Whitman measured on the west line of the road above-mentioned westerly eight rods, and fixed a monument at the

north-west corner of the lot; thence southerly four rods to the south-west corner, and fixed a monument; thence southerly eight rods to the west side of the highway; thence on the highway to the place of beginning; that his son Thomas H. Lidford and himself built a fence across the west end of said lot from corner to corner, as indicated by the monuments thus erected, at the time of said deed to Lidford, which fence remained until after the demandant went into possession under his deed; that the land included within said measurement was all that Thomas H. Lidford purchased as he understood it at the time, except that he was told by Whitman that his grant really extended to the center of the highway, which he was told was four rods wide." The court excluded this testimony, and ruled "that there was no ambiguity in the deeds offered by the plaintiff; that the amount called for 'on the road' was by the side of the road, and not the center of the road;" and directed the jury to render a verdict for the demandant. This is a ruling that by the construction of the deed the lines extended ten rods from the westerly side of the road.

In *Peck* v. *Denniston, ubi supra,* Chief Justice GRAY says: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the center of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction. *Newhall* v. *Ireson,* 8 Cush. 595; *Fisher* v. *Smith,* 9 Gray, 441; *Boston* v. *Richardson,* 13 Allen, 146; *White* v. *Godfrey,* 97 Mass. 472; *Motley* v. *Sargent,* 119 Mass. 231."

Not one of these cases however considers the construction to be given to a deed in which a highway is a point of departure for a measured line.

In *Newhall* v. *Ireson, ubi supra,* the line was "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first-mentioned bound." The seven rods terminated on the north at an old wall, which formerly constituted the southerly boundary of the road. The court held that the line ran to the center of the road, although this was more than seven rods.

The rule is stated in *Motley* v. *Sargent, ubi supra,* as follows: "It is a general rule of construction that where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements run only to the side of it, the title to the

land conveyed passes to the line which would be indicated by the middle of the monument."

The rule is then well established when the road is the *terminus ad quem*, but there is little authority when it is the *terminus a quo*, and there is no monument at the other end of the line.

A majority of the court is of opinion that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the center line of the stream or way. The ruling of the court, in the construction of the deed, was therefore *prima facie* correct, as there was no monument to determine the other end of the line. But this presumption can be controlled by evidence that the parties at the time of the conveyance established monuments of the boundaries. Without determining whether in this case there can be said to be a latent ambiguity in the deed (see *Hour* v. *Goulding*, 116 Mass. 132), or merely an indefiniteness in the description, we are of opinion that the acts of the parties contemporaneous with the delivery of the deed in fixing the monuments, and the subsequent fencing of the lot and the occupation in accordance therewith, are admissible in evidence upon the construction to be given to the deed. *Blaney* v. *Rice*, 20 Pick. 62; *Stewart* v. *Patrick*, 68 N. Y. 450; *Hamm* v. *San Francisco*, 17 Fed. Rep. 119.

New trial.

Hawks v. Locke.

(139 Mass. 205.)

Negligence — diseased animals.

By a railway accident a large number of swine were loosed. The defendant, the manager of the road, directed his servants to collect them and put them in a safe place. They put them in the plaintiff's barnyard in his absence and without his leave, but on his return he did not object, but assisted in feeding them, and also in taking them away for reshipment, and rendered a bill for food, services and damage to grass. The swine were diseased and infected the plaintiff's swine, but neither he nor the defendant knew of the disease. *Held*, that the defendant having acted within his authority was not liable.

ACTION for injury to swine. The opinion states the case. The plaintiff had judgment below.

J. A. Aiken, for defendant.

H. Winn, for plaintiff.

HOLMES, J. By an accident on August 12, 1881, to a freight train on the Troy and Greenfield railroad, which was then operated by the Fitchburg Railroad Company, under a contract hereinafter referred to, about one hundred and seventy swine were let loose from the train and were scattered about and on the track. The defendant, the manager of the first-named railroad, took charge of clearing up the wreck, and ordered his section master to collect the swine and put them in a safe place. A part of the swine were thereupon driven to the plaintiff's barnyard at about half-past five, and a part later in the afternoon, the plaintiff being absent from home, and having given no license to put them there. At about seven the plaintiff returned home, heard what was being done, and saw the men driving some of the swine toward his yard, but neither assented nor objected, and he made no objection at any time to the swine remaining in his yard. Two hours later he was asked to feed the swine the next morning, which he agreed to do, and did. He also collected and placed a few of the swine in his yard, and later assisted in taking the swine away for shipment. Soon after he sent a bill for food, services and the damage done to his grass to a person understood to be an agent of the defendant.

It afterward turned out that the swine were diseased, and the disease was communicated to the plaintiff's swine within a few minutes after the diseased animals were put into his yard. The plaintiff has suffered great loss, and now sues, alleging a trespass upon his premises by the defendant's servants, and consequential damages. The case was tried without a jury.

The defendant asked the court to rule, among other things, that "if the plaintiff, upon learning that the swine were upon his premises, made no objection to their remaining there, or consented to their remaining there, and afterward for a consideration fed and cared for them while they remained there, such conduct on his part would amount to a waiver of the trespass in putting them there, or be equivalent to a prior license to put them there, unless

C. A. Benjamin, for plaintiff.

F. L. Evans, for defendant.

HOLMES, J. This is an action of tort, under the Pub. Stats. chap. 112, § 212, alleging that the plaintiff's intestate was a passenger upon a train of the defendant; and that by reason of the defendant's negligence and the gross carelessness of its servants, his life was lost. There are three specifications. First, that the train was overloaded and the life of the intestate lost, because, by reason of the insufficiency of its rules, the corporation failed to make proper provision for carrying passengers; second, that the train was overloaded by the unfitness of the defendant's servants; third, that the intestate's life was lost by the gross negligence of the defendant's servants "in failing to provide sufficient cars for the reasonable accommodation of passengers, and in the overloading, running and management of said train."

The plaintiff's intestate had been travelling upon the engine, but got off at East Salisbury, a station where the train stopped, and after the conductor had called out "All aboard," and the train had started, ran and got upon the front platform of the front passenger car. The train was crowded, but there was no evidence that it would have been impossible for the deceased to reach the inside of the car, and there was testimony that he could have done so, and that he was asked by the brakeman to get out of the way so that the latter could do his work, but retorted that he had been on this road twenty years, and know more about railroads than the brakeman did. The deceased stood upon the step of the platform facing inward, and after the train had gone from a quarter to half a mile fell off and was killed. In half a mile the train had reached a speed of thirty miles an hour, and according to some of the witnesses, it was swaying violently when the deceased fell. The track was straight. The court ruled that the action could not be maintained upon the evidence, and directed a verdict for the defendant.

We are of opinion that the ruling was correct, and that none of the specifications were maintained. If we should assume that the deceased had acquired the rights of a passenger, and that the defendant failed to make proper provision for carrying passengers, or that the train was overloaded by the unfitness of the defendant's servants, still we should have some difficulty in saying that the

overloading was the cause of the death, notwithstanding the decision in *Commonwealth* v. *Boston & Lowell Railroad*, 134 Mass. 211. For if the place which the deceased took was unfit and dangerous, its unfitness and danger already existed and were manifest before he took it. If there was a crowd on the platform the deceased saw it. And certainly the argument would be strong that he, rather than the defendant, was the cause of his being where he was, and of his exposure to the danger incident to that place.

But we do not pass upon this point, because we cannot assume that the deceased had acquired the rights of a passenger. He did not do so when he got upon the engine, a place to which he was not invited, and which every one knows is not intended for passengers, and where in this case he would have escaped paying fare, as it was inaccessible to the conductor. Then supposing that his start upon the engine did not give a character to his subsequent relation to the defendant (*Swan* v. *Manchester & Lawrence R.*, 132 Mass. 116, 120; s. c., 42 Am. Rep. 432), and that the deceased was in the same position as if he had attempted to get on at East Salisbury for the first time, it is clear that when he attempted to get upon the moving train after it had started, he was outside of any implied invitation on the part of the defendant, and did not at once acquire the rights of a passenger in the hands of a carrier.

We may admit that if he had reached a place of safety and seated himself inside the car, the bailment of his person to the defendant would have been accomplished, so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him on the threshold, and had put himself in the proper place for the carriage of passengers.

It is no answer to say that he was prevented from doing so by the defendant's fault. There was no evidence that the deceased was compelled to remain on the step of the platform. But even if the jury would have been warranted in finding that there was such a crowd that the deceased naturally stopped where he was, although not strictly compelled to do so, and that the crowding was due to the defendant's fault, still there was no fault as toward the deceased, because the defendant was not bound to provide for the contingency of people getting upon the train after it had started. We may add that there is not a particle of evidence that if deceased

had got upon the train at the proper time, he could not have reached the inside the car.

There is nothing in the subsequent conduct of the defendant of which the plaintiff can complain. The defendant was not bound to stop its train by reason of any thing which it is shown to have known, or of which there is any evidence. And if the defendant had a right to run its train at all, it was not gross negligence to run it at the rate of thirty miles an hour on a straight track. There was no allegation or proof of any defect in the cars which made the motion worse than usual. The speed was not unusual, and moreover it was hardly connected with the death by any thing more substantial than conjecture.

Exceptions overruled.

SWEENEY v. MULDOON.

(129 Mass. 304.)

Executor and administrator — liability for gravestone — statute.

No action lies against an administrator for the cost of a monument to the intestate, erected at the request of the widow, and against the wish of the administrator, although the statute authorizes the Probate Court, on the settlement of an estate, to allow a reasonable sum for a monument.

ACTION for price of a monument. The head-note shows the facts. The defendant had judgment below.

J. Willard and *C. Steere*, for plaintiff.

J. A. Maxwell, for defendant.

FIELD, J. [Minor matters omitted.] The statute of 1878, chap. 228, provided that "Probate Courts, in the settlement of the estates of deceased persons, may allow as a part of the funeral expenses a reasonable sum expended for a monument and burial lot for such persons." In this case the widow and next of kin united in requesting the plaintiff to purchase a burial lot, and she did so. If the deceased owned a burial lot, or had a right of burial in a public or private cemetery, we are not required to determine whether, independently of the statute, his estate could be charged with the cost of purchasing another burial lot, or right of burial, selected by his

widow and next of kin, because the defendant does not object to this item in the account. We have been shown no case in this Commonwealth in which, before this statute, the cost of a burial lot was considered as a part of the funeral expenses. By the Pub. Stats., chap. 82, § 9, "each town and city shall provide one or more suitable places for the interment of persons dying within its limits," and it could not well happen in this Commonwealth that the purchase of a burial lot would be absolutely necessary for the proper interment of the deceased. The widow and next of kin undoubtedly have the right, as against strangers, to determine the place of burial; but if the place selected is other than that in which the deceased had a right of burial, it may be that at common law they must obtain the right of burial at their own expense.

The plaintiff objects to the ruling that she could not recover the item in the account for the purchase by her, at the request of the widow, of a monument or tombstone for the deceased. This was purchased after the appointment of the defendant as administrator, and not at his request. Before the statute of 1878, chap. 228, the purchase of a tombstone has, we think, never been considered as a part of the funeral expenses. It is not necessary to the proper interment of the deceased, and if erected at all, is usually erected after the burial.

By the Pub. Stats., chap. 130, § 15, "a special administrator may by leave of the Probate Court pay from the personal estate in his hands the expenses of the last sickness and funeral of the deceased." The personal estate not lawfully disposed of by will shall, after the allowance to the widow and children, be first "applied to the payment of the debts of the deceased, with the charges of his funeral and of the settlement of his estate." Pub. Stats., chap. 135, § 3, cl. 1. If the estate of the deceased is insufficient to pay all his debts, "it shall, after discharging the necessary expenses of his funeral and last sickness and the charges of administration, be applied to the payment of his debts in the following order." Pub. Stats., chap. 137, § 1.

The purchase of a tombstone cannot be considered as a part of the charges or necessary expenses of the funeral, within the meaning of these provisions of the statutes. It was not intended that any person might erect a tombstone to the deceased, and charge the administrator with the cost of it, as a debt or a preferred debt against the estate. The necessity for a decent burial arises immedi-

ately upon the decease, and the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose; but there is no similar necessity for the erection of a tombstone, and if a tombstone is erected without the authority of the administrator, the statutes have not made the cost of erecting it a debt of the estate. We think it was not the intention of the Stat. of 1878, chap. 228, to authorize another person, without authority from the administrator or executor, to erect a monument to the deceased, and sue the administrator or executor therefor, in an action at law, but merely to authorize an administrator or executor to expend a reasonable sum for that purpose, if it becomes necessary, and there are sufficient assets. It is unnecessary to consider what the power of the Probate Court is, if that court should think such an expenditure ought to be made, and the administrator or executor should decline to make it.

Judgment on the verdict.

Innerarity v. Merchants' National Bank.

(139 Mass. 332.)

Corporation — imputed notice through director.

A. shipped a cargo to B., with authority to sell it for him, upon an absolute bill of lading in B.'s name. B. indorsed the bil' of lading and pledged the cargo to the defendant bank, of which he was a director, as security for a loan to him, the loan being approved at a meeting of the board of directors, at which B. was present. *Held*, that B.'s knowledge was not imputable to the bank, and the bank was not liable to A. for conversion.*

ACTION for conversion. The opinion states the case. The defendant had judgment below.

E. D. Sohier & F. L. Hayes, for plaintiffs.

S. Bartlett & L. S. Dabney, for defendant.

Devens, J. This is an action of tort, for the conversion of four hundred and fifty-five hogsheads of sugar, four hundred and forty-four of which had constituted a part of the cargo of a vessel,

* See note, 39 Am. Rep. 322.

called the J. H. Lane, and eleven of which had constituted a part of a cargo of another vessel, called the Unity. The questions as to the latter lot will not require separate consideration, if it shall be determined that as to the larger lot the plaintiffs are not entitled to maintain their action. The sugar shipped by the J. H. Lane was, by a bill of lading, consigned to Benjamin Burgess & Sons, and purported to be shipped by their order. Burgess & Sons had possession of the bill of lading, with authority to sell the sugar. They pledged it and delivered the bill of lading thereof to the defendant for a loan of $43,000, as hereafter stated, which loan has not been repaid. The defendant had no actual notice or knowledge that said sugar was not the property of Burgess & Sons, or that they were in any respect the agents of other parties.

On March 23, 1883, B. F. Burgess, who was the senior member of the firm, and was also a director in the defendant bank, entered into an agreement with the president of the bank for a loan of $43,000 on a pledge of the sugar. The president had authority, in the intervals of the meetings of the board of directors, to make such loans, which were afterward usually, though not always, laid before the board at its next meeting, and subjected to its approval. On March 26 the directors had a meeting, and this, with other proposed loans, was laid before them, and approved. At this meeting Burgess was present, but it did not appear what part he took thereat. The loan was made, to be secured by the bill of lading of the sugar, which was indorsed to the bank, and the note of Burgess and Sons was given of the date of March 26, the day of the transaction with the president, but the proceeds were not carried to their credit until March 26.

This transfer by Burgess and Sons of the sugar was a fraud upon the plaintiffs; but it is not contended that it in any way failed to convey a full title in pledge to the defendant bank, unless under the circumstances the bank is to be charged with the knowledge of Burgess. The plaintiffs requested the presiding judge to rule that if Burgess was present as a director when said loan was acted upon by the board of directors, his knowledge of the plaintiffs' title to the sugar, and that the firm of Burgess and Sons had no right to pledge it, was the knowledge of the defendant bank. This ruling was refused by the presiding judge, who found for the defendant.

While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there

is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, 15 Ch. D. 639; *In re European Bank*, L. R., 5 Ch. 358; *In re Marseilles Extension Railway*, L. R., 7 Ch. 161; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *Loring* v. *Brodie*, 134 Mass. 453.

One of the most recent cases on this point is *Dillaway* v. *Butler*, 135 Mass. 479. A., to whom B. was indebted, advised C. to lend money to B. on the security of a mortgage of personal property, and acted as C.'s agent in completing the transaction. With the money thus obtained B. paid A. the debt he owed him. Both A. and B. acted in fraud of the Gen. Stats., chap. 118, §§ 89, 91; but C. had no knowledge of the fraud. It was held that the knowledge of A. was not in law imputable to C., although A. had acted for C. in the negotiation.

But the question in the case at bar is not so much what are the responsibilities of a principal for an agent, as whether Burgess can be considered in any proper sense as an agent for the defendant bank in the transaction of the loan, even if directors are ordinarily to be treated as such. The plaintiffs seek to impute to the corporation knowledge of a fraud, because in a contract made avowedly not for it, but for himself, and necessarily acting adversely to its interests, a director was aware that he was committing a fraud. This in effect is to say that there can be no transaction between a bank and one of its directors in which, so far as the transfer of property is concerned, the bank can be protected, if there is fraud on the part of the director, and that the bank can never discount paper on which one of its directors is a party, and retain the position of an innocent indorsee for value under the law merchant.

A bank or other corporation can act only through agents, and it is generally true, that if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge. *National Security Bank* v. *Cushman*, 121 Mass. 490. But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position

he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds, by imputing to the bank a knowledge those properly representing it could not have possessed. Whether Burgess acted or not at the meeting of the directors in the matter of the loan, he could not lawfully have done so as the representative of the bank. His individual interest was distinctly antagonistic; and the question before the board related to its approval of a provisional transaction between himself and the president of the bank, in which he was the proposed borrower and the bank was to be the lender. A director offering a note of which he is the owner for discount, or proposing for a loan of money on collateral security alleged to be his own property, stands as a stranger to it. That a joint-stock bank, says, in substance, Sir W. M. JAMES, should have imputed to it the knowledge which the director has of his own private affairs, is a most unreasonable proposition. *In re Marseilles Extension Railway*, L. R., 7 Ch. 170. The relation which a director, who is himself acting for another in a negotiation for a bank, occupies toward it was considered in *Washington Bank* v. *Lewis*, 22 Pick. 24, where it was argued, that although he was not the agent of the bank, yet his knowledge of facts showing the note to be invalid was that of the bank. "Whatever a director or other agent of a bank," say the court, "may do within the scope of his authority would bind the bank so as to make them responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director, nor could he with any propriety so act. He was the party with whom the bank contracted in discounting the note, and to whom the money was paid."

The proposition that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority. *Stratton* v. *Allen*, 1 C. E. Green, 229; *Barnes* v. *Trenton Gas-light Co.*, 12 C. E. Green. 33; *Highstown Bank* v. *Christopher*, 40 N. J. L. 435; *Winchester* v. *Baltimore & Susquehanna Railroad*, 4 Md. 231; *Wickersham* v. *Chicago Zinc Co.*, 18 Kans. 41; s. c., 26 Am. Rep. 784; *Seneca County Bank* v. *Neass*, 5 Denio, 329, 337; *Third National Bank* v. *Harrison*, 10 Fed. Rep. 243; *Stevenson* v. *Bay City*, 26 Mich. 44; *In re Marseilles Extension Railway, ubi supra; In re European Bank, ubi supra.* In some of these cases weight appears to be given to the

fact that the director was not actually present at the meeting when the transaction was concluded; but this cannot be of importance. If it were shown that Burgess urged the loan upon the board of directors, and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that under such circumstances the facts he knew were communicated to the directors, and that he laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented.

While the current of authority is in favor of the conclusion we have reached, two cases are much relied on by the plaintiffs which were not overlooked in the opinions delivered in several of the cases cited above, and which have not there commanded approval. These are *United States Bank* v. *Davis*, 2 Hill, 451, and *Union Bank* v. *Campbell*, 4 Humph. 394. In each of these cases it was held that the knowledge of a director of what was held to invalidate a contract was to be imputed to the bank. In neither of these cases was the director whose knowledge was imputed to the bank the adverse contracting party, which would perhaps distinguish them sufficiently from the case at bar. But in each of them the director acted for the person contracting with the bank, and thus secured to himself important advantage; and we are not prepared to assent to the proposition that a director thus acting is competent to affect with his knowledge of fraud the bank whose director he is. His interests and conduct are adverse to it, and his position forbids that he should be treated as its representative.

Exceptions overruled

BISHOP v. WEBER.

(139 Mass. 411.)

Negligence — public caterer — unwholesome food.

A public caterer, employed to furnish refreshments at a public ball, is liable for an injury suffered by one attending, by reason of unwholesome provisions furnished by him.

ACTION for personal injury. The head-note shows the case. The defendant had judgment below.

J. D. Bryant, for defendant.

B. C. Moulton, for plaintiff.

C. ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such, by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment, and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty voluntarily assumed. Indeed where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty however arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties. *Norton* v. *Sewall*, 106 Mass. 143; s. c., 8 Am. Rep. 298; *Longmeid* v. *Holliday*, 6 Exch. 761; *Pipin* v. *Sheppard*, 11 Price, 400.

[Minor matter omitted.]

The defendant relies on several other extremely fine points of objection, but without dwelling on them in detail, it may be said

in general terms, that the several counts sufficiently set forth the facts from which the duty of the defendant toward the plaintiff sprung, and it is not necessary to state formally and in terms that the defendant occupied such a relation toward the plaintiff that the law cast upon him the duty; they also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured.

Judgment reversed.

CAVANAGH v. BOSTON.

(139 Mass. 426.)

Municipal corporation — illegal action to abate nuisance — liability therefor.

In the absence of statutory authority a city may not erect a dam on a person's land without his consent, to abate a nuisance on other land, and such action being unauthorized, the city is not liable for injury caused thereby.

ACTION for injuries by erection of a dam. The head-note shows the case. The defendant had judgment below.

W. E. L. Dillaway, for plaintiffs.

T. M. Babson, for defendant.

C. ALLEN, J. The difficulty with the plaintiff's case is, that neither the board of health nor the city government had any authority to abate the nuisance in the manner which was adopted. That manner was by the erection of a dam, the easterly portion of which was built across the flats and upon the upland of the plaintiffs, for the purpose of raising the water so as to flow over other flats away from the flats of the plaintiffs; the plaintiffs' evidence tending to show that no nuisance existed on their own flats. This was no occupation of the plaintiffs' land which the city had no power to make, without the plaintiffs' consent. No statute conferred the power of appropriating the plaintiffs' property for public uses, nor provided compensation to them for damages sustained by such ap-

propriation. When the preservation of the public health has been thought to require such acts as the filling of land, or raising its grade, over a considerable extent of territory, or the covering of land with water, or the removal of dams from streams, in order to allow better drainage or to prevent the accumulation of offensive materials, it has been usual to pass statutes giving the requisite authority, and making due provision for the protection of the property of individuals. Instances of such legislation may be found in Stat. of 1867, chap. 308, authorizing the city of Boston to take certain lands in the Church street district, so called, which was before this court for consideration in *Dingley* v. *Boston*, 100 Mass. 544, and in *Cobb* v. *Boston*, 109 Mass. 438, and 112 Mass. 181; in the Stat. of 1869, chap. 378, authorizing the county commissioners of Middlesex county to remove all dams on certain streams, for the purpose of securing proper drainage in certain towns, which was under consideration in *Phillips* v. *County Commissioners*, 122 Mass. 258, and in *Phillips* v. *Middlesex*, 127 Mass. 262; in the Stat. of 1872, chap. 299, where the cities of Cambridge and Somerville were authorized to raise certain low lands to a proper level, which was before the court in *Cambridge* v. *Munroe*, 126 Mass. 496; *Bancroft* v. *Cambridge*, 126 Mass. 428; and *Read* v. *Cambridge*, 126 Mass. 427; and in the Stat. of 1873, chap. 340, providing for the filling of lands in the Northampton street district, so called, in Boston, which was considered in *Farnsworth* v. *Boston*, 121 Mass. 173.

The general power vested in boards of health and in city governments is not adequate to dealing with such cases, if it is impossible to come to an agreement with the owners of property to be affected. There is no general statute vesting in these bodies the right of eminent domain, or making provision for the compensation of persons whose property may be taken. The general phrases contained in the city ordinances, which have been referred to, authorizing the city council to exercise the powers vested in them for the preservation of the public health in any manner which they may prescribe, cannot be held to give them authority to take private property for public uses. No such power existed in the body which enacted the city ordinances. In the present case, the acts of which the plaintiffs complain amount to an occupation of their land for the purpose of building a dam thereon in such a manner that clearly it was an appropriation of the land to a public use. It was not a mere transient entry and occupation, though the dam was

styled temporary; but there was a substantial and practically exclusive occupation of a portion of the plaintiffs' land. Such an act was clearly illegal. It does not fall within the principle upon which a brief or momentary occupation of private lands is sometimes justified through necessity, as for example for the purpose of making an arrest, or of the perambulation of the boundaries of towns by the selectmen, or of ascertaining boundaries for public purposes. *Winslow* v. *Gifford*, 6 Cush. 327.

The present case is a much stronger one than *Brigham* v. *Edmands*, 7 Gray, 359, where a verdict was sustained against the commander of a division of the militia, as a trespasser, for holding the annual encampment provided for by law upon private lands, without the owner's consent. See also *Baker* v. *Boston*, 12 Pick. 184, 194. No doubt the plaintiffs might have obtained an injunction to restrain the prosecution of the work, if they had sought their remedy in that form. *Boston Water Power Co.* v. *Boston and Worcester Railroad*, 16 Pick. 512, 525.

The acts done having been beyond the authority and power of the city to do, the city cannot be held responsible in damages for what was done under the supposed authority of illegal and void votes. *Spring* v. *Hyde Park*, 137 Mass. 554; s. c., 50 Am. Rep. 334; *Lemon* v. *Newton*, 134 Mass. 476; *Cushing* v. *Bedford*, 125 Mass. 526. But the liability, if any, rests upon the individuals who performed those acts, as in *Brigham* v. *Edmands*, *ubi supra*.

The plaintiffs seek to avoid this result by urging that a part of the damage came from the negligent construction of the dam. But since it was an illegal act to build it at all, it is not apparent how negligence in the trespassers can entail a responsibility on the city.

Exceptions overruled.

HINCKLEY v. THATCHER.

(139 Mass. 477.)

Will — charitable bequest — evidence to explain.

A testator bequeathed the residue of his estate "equally to the authorized agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ." *Held*, that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which the missionary societies were called by him, and the religious society with which he worshipped, his interest in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to identify the societies intended.

A bequest to a missionary society, "to aid in propagating the Holy religion of Jesus Christ," is valid.

BILL for construction of a will. The opinion states the facts.

M. A. Fowler (of New York) *& J. L. Thorndike* and *F. C. Welch*, for next of kin.

R. R. Bishop, G. Wigglesworth, and *J. N. Marshall*, for societies.

FIELD, J. Henry Knox Thatcher died on April 5, 1880, leaving a will, which was executed on March 18, 1870, and was written by himself. The first clause of the last article of the will is as follows: "I also will and desire that the residue of my property, if any, after paying my funeral expenses and just debts, as well as all before-named bequests, be given equally to the authorized agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ."

In the original will the word "Home," and the words "Foreign Missionary Societies" begin with a capital letter. There is nothing else in the will that affords any aid in construing this clause, unless it be thought that the declaration in the first clause of the will might aid the court in determining what the testator meant by the "Holy religion of Jesus Christ," if it becomes necessary to determine it. That declaration is as follows: "Realizing the uncertainty of human life, which by the blessing of my Heavenly Father I have been permitted to enjoy for so long a time, and acknowledging my firm belief in Him, and in the efficacy of the atonement of His Son,

our Lord and Saviour Jesus Christ, and with the hope of the final salvation of my immortal soul through His merits, and being of sound mind and memory, I declare this instrument to be my last Will and Testament."

The two principal questions argued are, first, whether the Home and Foreign Missionary Societies intended by the testator can be identified; and secondly, if they cannot be, whether this is a valid charitable bequest. One question of evidence has been argued, which is, whether evidence of the testator's religious opinions at the time he executed the will is admissible, either for the purpose of identifying the societies, or of showing what the testator meant by "the Holy religion of Jesus Christ."

The case is one in which no society or societies are shown to exist which conform accurately to the name of description contained in the will; and such cases as *Tucker* v. *Seaman's Aid Society*, 7 Metc. 188, need not be noticed.

In *Shore* v. *Wilson*, 9 Cl. & Fin. 355, it was left undetermined whether the religious opinions of Lady Hewley could be shown for the purpose of determining the meaning of the words "Godly preachers of Christ's holy Gospel," contained in her deed of 1704. "The evidence which goes to show the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party," was held admissible, and sufficient to support the decision. p. 550. A majority of the judges however, whose opinions were taken by the House of Lords, advised that evidence of the religious views of Lady Hewley could not be considered except for the purpose of showing her connection with a religious denomination the members of which used the words in a restricted sense, and the House of Lords intimate that such is their opinion. See *Drummond* v. *Attorney-General*, 2 H. L. Cas. 837; and *Charter* v. *Charter*, L. R., 7 H. L. 364. But in carrying into effect, by means of a scheme, a charitable bequest for religious purposes, when the terms of the gift are indefinite, it seems that the religious opinions of the donor are sometimes regarded in England *Attorney-General* v. *Calvert*, 23 Beav. 248; *Attorney-General* v. *Glasgow College*, 2 Coll. Ch. 665. The precise point we find it necessary now to discuss is whether such evidence can be considered for the purpose of identifying the missionary societies intended by the will.

It may perhaps be conceded that the private religious opinions of the testator would not be competent evidence, but evidence of his public religious acts and association with a particular denomination of Christians, in connection with other testimony, has often been admitted; and we are not prepared to say that there might not be cases in which such evidence, unconnected with other evidence, would be competent. If each denomination of Christians had one missionary society bearing the name of the denomination, and a testator left a bequest to "the Missionary Society," without further description, his publicly professed religious belief would naturally throw some light upon the meaning. It could not well be presumed that a zealous Roman Catholic could intend by these indefinite words a Protestant missionary society, or that a zealous Trinitarian intended such a gift for a Unitarian society.

There is however little or no evidence in this case of the religious opinions of the testator, except as they may be inferred from his acts in connection with churches and religious societies, and the usages of those churches and societies, and it is unnecessary to decide whether his religious opinions, disconnected from the other evidence, would be competent. Some of the evidence reported relates to times which were so long after the execution of the will as to be incompetent.

In carrying into execution every will, extrinsic evidence is necessary to identify the legatees. The evidence often leaves no room for doubt, as the name or description of the legatee in the will accurately conforms to the facts established by the evidence; but when the evidence raises a doubt, the question arises whether by competent evidence, the identity of the legatee can be ascertained with reasonable certainty.

The facts known to the testator at the time he executed this will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions, if any, that he made for missionary purposes, are competent evidence to aid in identifying the missionary societies intended by the will.

The testator was a rear admiral in the navy of the United States, and was retired from active service in 1868, when he went to reside in Winchester, in this Commonwealth, where he had previously bought a house, and with it a pew in the meeting-house

in Winchester, in which a Trinitarian Congregational church and society worshipped. In the testimony the word Congregational is confined to Orthodox or Trinitarian Congregational churches and societies, and for convenience, we shall use the word in that sense. The testator was not a member of any church until 1878, when he was confirmed in the Protestant Episcopal church at Charleston, in this Commonwealth. His principal place of residence from 1868 until his death seems to have been Winchester, although he was absent something less than a year at Portsmouth, New Hampshire, as port admiral, and from 1873 his summers, or some of them, were spent in Nahant, and the winters for the last two years of his life were spent in Boston. In the spring of 1871, he became a member of the Congregational society at Winchester, by vote of the society. When in Winchester, he appears to have attended constantly the morning service of the Congregational church, and often the afternoon service, when there was such a service, and frequently the evening meetings and monthly concerts, and the business meetings of the society after he became a member, and he was a member of the Bible class of the Sunday school. He paid annually his pew-tax of $72 a year, and a subscription of $50, for the support of the church and society. When in Nahant, he attended the Methodist Episcopal church, the only other church in Nahant being a Union Church, in which ministers of different denominations preached in turn during the summer. After he was confirmed in the Episcopal church in Charleston, in 1878, he occasionally attended that church, but otherwise continued, as before, to attend the Congregational church in Winchester. It appears that Admiral Thatcher, as a boy, was accustomed to attend a Congregational church; that his father, mother and sisters were of that faith; that he was married in 1831, and his wife was a member of that church, and that when on shore and at home, he for the next ten years attended with her a Congregational church, in Mercer, Maine. It seems that the religious service in the navy, which he attended when on duty, was the Episcopal service. In 1854 and 1855, in Philadelphia, he went to different churches. In 1859, he was stationed at the Charlestown navy yard in Massachusetts, and remained there until January, 1862. He attended the Episcopal service at the yard, or on shipboard in the morning, and in the afternoon went with his wife, sometimes to the Episcopal church, and sometimes to the Congregational church. At one time, about 1849, he hired a pew in Grace church,

an Episcopal church in Boston, and he and his wife agreed that they should go half the day to the Episcopal church, and half the day to the Congregational church; but this pew he gave up not long afterward, and went to a Congregational church.

In Portland, in 1842, he went to the Congregational church. He was in active service during the war, and in 1866 was ordered to the Pacific coast to take command of the North Pacific Squaddon, with his head-quarters at San Francisco, where he remained about two years, and when on shore in San Francisco he attended Dr. Stone's church, which was Congregational, and Dr. Eell's church, which was Presbyterian. At Honolulu, in 1866, he did not attend the Episcopal church, but attended either a Congregational or Presbyterian church. At all churches where he attended he was in the habit of putting something into the contribution-box whenever it was passed, whatever the object of the contribution was, and he habitually contributed in this way to both home and foreign missions in Winchester. There is no evidence that he ever worshipped with a Roman Catholic, a Baptist or a Unitarian church.

It is apparent that Admiral Thatcher was a constant attendant upon public religious worship; that he confined his attendance to the Protestant Trinitarian churches; that he used in the navy, as is customary, the Episcopal service; that at times before 1870 he showed a personal preference for the Episcopal church, but that this preference was not very strong; that he attended the Episcopal, Congregational, Methodist or Presbyterian churches, without any decided denominational bias, according to his convenience, or his approbation of the minister or the service; and that as a fact he more frequently attended the Congregational churches than any other, influenced perhaps to some extent by the wishes of his wife.

The interest he is shown to have felt in the missionary work of the American Board, the knowledge of the relations existing between that board and the Massachusetts Home Missionary Society, which he obtained from Mr. Phillips, the manner in which the two societies were usually spoken of in the church and religious society at Winchester, where he worshipped when he made the will, and the manner in which he spoke of them, have far more significance than the evidence of his attendance at churches.

Of the list of missionary societies contained in the schedule annexed to the answer of the attorney-general there is no evidence that the existence of the greater part of them was known to the tes-

tator when he executed his will, although he probably knew that nearly all the different Christian denominations had missionaries and missionary societies. It appears abundantly by the testimony that in 1870, when the will was executed, he knew of the American Board of Commissioners for Foreign Missions; had been acquainted with some of its officers, agents and missionaries, and was interested in the work that society was doing; and that he knew of the Massachusetts Home Missionary Society as a co-operating society, devoted wholly to home missions, while the American Board was devoted exclusively to foreign missions. It does not appear that he knew definitely the relations existing between the Massachusetts Home Missionary Society and the American Home Missionary Society. He had, when in command of the Constellation in the Mediterranean, some years before he went to reside at Winchester, proceeded with his ship to Syria to witness the execution of a murderer of one of the missionaries of the American Board; and although he did not witness it, yet the circumstance seems to have called his attention to the foreign missionaries of the American Board and the work they were doing, and from that time he manifested in many ways unusual interest in the missions of that board; and in 1869 the American Board began sending him the Missionary Herald, a monthly publication of that society. From 1869 therefore he was constantly receiving the Missionary Herald. The American Board of Commissioners for Foreign Missions is the principal foreign missionary society of the Congregational church in the United States. It was one of the principal charities to which the Congregational church and society at Winchester contributed before and in 1870; and by the Foreign Missionary Society, in the Congregational church and society at Winchester before and in the year 1870, this society was meant. Both before and after executing this will he is shown to have spoken approvingly of the work of the missionaries of that society in the East. He was interested in the purchase of a vessel called the Morning Star, which was built by the American Board in 1870. If the bequest in the will had been solely to the Foreign Missionary Society, in view of the knowledge of the testator, at the time of the execution of the will, of the American Board of Commissioners for Foreign Missions, the interest he had shown in it, the acquaintance he had had with some of its officers and missionaries, the favorable opinion he entertained of the work it was doing, the fact that in the church and religious society which he attended

it was often spoken of as the Foreign Missionary Society, and was the foreign missionary society for which contributions were annually taken up, to which he contributed, and was one of the great charities which that church and religious society was supporting, and the only one called by that name — and also of the fact that it is not shown that he at that time was interested in any other American foreign missionary society — we can have no doubt that it would be a reasonable and proper inference that the testator intended by the Foreign Missionary Society, the American Board of Commissioners for Foreign Missions. *American Tract Society* v. *De Witt*, 9 Allen, 447; *Tilton* v. *American Bible Society*, 60 N. H. 377; *Attorney-General* v. *Dublin*, 38 N. H. 459; *Goodhue* v. *Clark*, 37 N. H. 525; *Button* v. *American Tract Society*, 23 Vt. 336, 349; *Dunham* v. *Averill*, 45 Conn. 61; s. c., 29 Am. Rep. 642; *Howard* v. *American Peace Society*, 49 Me. 288; *Brewster* v. *McCall*, 15 Conn. 274; *In re Fearn's Will*, 27 W. R. 392; *In re Kilvert's Trusts*, L. R., 7 Ch. 170.

But the bequest is "equally to the Authorized Agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ." The word "societies" plainly shows that more than one society was meant, and that the words "the Home and Foreign Missionary Societies" were not intended as the name of one society. One contention is, that two and only two societies were meant — one, the Home Missionary Society and the other the Foreign Missionary Society. The use of the definite article and of the capital letters by the testator perhaps slightly favors this contention. The facts favor it. If there had been more than one society known to the testator in which he was interested, each of which was a home and foreign missionary society, the contention might well be that he intended this bequest for each of such societies; but no such facts appear. There is a little evidence of an American missionary society or association "which does work among the slaves at the South, as well as foreign missionary work," to which the church and society at Winchester contributed from 1870 to 1880; but it is not shown that Admiral Thatcher ever spoke of it, or took any interest in it, or ever knew of its existence, unless this is to be inferred from the fact that he attended the meetings when contributions for this society or association were sometimes taken. Whether this society or association is incorporated or not, there is no evidence which enables us to

and the Massachusetts Home Missionary Society, are entitled to receive the residue in equal shares.

So ordered.

JACKSON COMPANY v. BOYLSTON MUTUAL INSURANCE COMPANY.

(139 Mass. 508.)

Insurance — subrogation of carrier.

In the absence of express provision to the contrary the owner of goods in transit may give the carrier the benefit of his insurance, and this does not avoid the policy as a sale, assignment, transfer or pledge of interest.

ACTION on fire insurance policy. The opinion states the case. The plaintiff had judgment below.

F. Peabody, Jr., for defendant.

E. Merwin & R. H. Gardiner, Jr., for plaintiff.

DEVENS, J. This is an action on a policy of insurance, by which the defendant insured the plaintiff on cotton in transit between ports and places between the United States and the plaintiff's mills in New Hampshire. The cotton was bought by one Ivy, as broker for the plaintiff, and was shipped by him by the Atlanta and West Point Railroad Company and connecting lines. It was in two lots, and Ivy, attaching the two railroad receipts to a draft, drew on the plaintiff for the amount of the purchases. The draft, with the railroad receipts attached, was received by the plaintiff's treasurer on October 17, 1883, and paid on presentation; after which he gave notice to the defendant of the shipments, and presented the policy that they might be indorsed thereon, which was done. The railroad receipts given on behalf of the Atlanta and West Point Railroad Company and connecting lines contained a stipulation that in case of loss or damage to the cotton sustained during transportation, whereby legal liability might be incurred, only that company should be responsible in whose actual custody the cotton might be at the time of the occurrence, and further, that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton." There was

an additional agreement in the stipulation as to the mode of computing the value of the property, not now important.

Ivy did not read the railroad receipts, and it does not appear whether he did or did not know their contents, so far as the clause relating to insurance is concerned. The railroad receipts were not sent to the defendant, nor their contents communicated, nor did it ask to see them. It did not appear that the defendant knew whether they were received. The plaintiff's treasurer did not read them, nor did he or the plaintiff know that they contained this clause, nor did they know that receipts containing such a clause would be, or were likely to be taken; and no fraud or concealment from the defendant was intended.

While in transit, and in the actual custody of the South Carolina Railroad Company, a common carrier, and one of the connecting lines of the Atlanta and West Point Railroad Company, and in the State of South Carolina, thirty-six bales of the cotton insured were destroyed by a fire, the origin and cause of which are unknown. For the value of this cotton this action is brought.

The defendant contends, that whether the contract between the plaintiff and the carrier is governed by the law of Massachusetts, Georgia or South Carolina, it was, so far as it stipulated in favor of the carrier for the benefit of any insurance that might have been effected, valid and binding upon the plaintiff. While this question has been thoroughly discussed on both sides, and with careful examination of the statutes and decisions in each State, it will not be necessary to decide it. In the view we take of the case we shall assume, in favor of the defendant's contention, that the stipulation was valid and binding between the plaintiff and the carrier.

If it be thus held, the defendant then contends that this was a contract in violation of the defendant's rights, and rendered the policy void for the reason, that when the insurer of goods in the custody of a carrier pays the loss on the goods insured to the owner he is ordinarily entitled to be put in the place of the insurer, and clothed with all his rights. *Hart* v. *Western Railroad*, 13 Metc. 99; s. c., 46 Am. Dec. 719. The defendant further contends that this being the well recognized law at the time of the contract of insurance, both the plaintiff and the defendant must have contemplated this right of subrogation in case of loss, and if the plaintiff has destroyed it by a contract which would deprive the defendant of this right, the policy is avoided.

Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities. This right does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other. The party subrogated acquires no greater rights than those of the party for whom he is substituted. It is as a general principle true that if goods are injured by transportation under such circumstances that the carrier and the insurer are alike liable therefor, and if the insurer pays for such injury, he will be subrogated to such claim as the owner may have against the carrier. And this, apparently, because the liability of the carrier is treated as primary, while that of the insurer is secondary only. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier. But as the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage so as to suit his own interest, provided there is no fraudulent concealment from the insurer; and the right which the insurer obtains is subject to the agreement made with the carrier. Carriers have an insurable interest in the goods they transport, and may therefore effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and if so why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud or any contract to the contrary with the insurer. *Chase* v. *Washington Ins. Co.*, 12 Barb. 595; *Van Natta* v. *Mutual Security Ins. Co.*, 2 Sandf. 490. The owner is under no obligation to contract so that he shall have a remedy against the carrier under every circumstance in which the carrier has been held liable by the common law. If he may accept a receipt excusing the carrier from liability for fire, and still hold the insurer, he may also make a contract that the insurance shall be for the benefit of the carrier.

The defendant contends, that by reason of the existence of this right of subrogation, the plaintiff has obtained its insurance at a lower rate than it otherwise would have done; but it is also true, that by an agreement that the carrier shall have the benefit of the insurance, he

has probably obtained the carriage of his goods at a lower rate of transportation. The insurer, as against the carrier, is entitled to preference only when there is no agreement to the contrary, and the insured thus has a claim against the carrier. If the carrier may insure on his own account, he may contract with the person whose goods he carries that such person shall insure for his benefit. While the question has not been the subject of discussion in this Commonwealth, these remarks are well sustained by authority elsewhere.

In *Mercantile Ins. Co.* v. *Calebs*, 20 N. Y. 173, it was held that the carrier of goods might, by contract with the owner, secure to himself, in case of loss or damage to the goods for which the carrier would be liable, the benefit of any insurance to be effected by the owner; and that such a clause in a contract of carriage, although made without the assent or knowledge of the insurer, was not a fraud on his rights. This case did not present the element of negligence on the part of the carrier. In *Phœnix Ins. Co.* v. *Erie & West. Trans. Co.*, 10 Biss. 18, it appeared that the loss was caused by the negligence of the servants of the carrier; and it was held that even if the carrier could not, as between himself and the shipper, have contracted that he should not be liable for his own negligence or that of his servants, he was entitled to contract with the shipper for the benefit of his insurance. Having so done, the insurance company, which had paid the shipper, obtained no right of action by subrogation against the carrier. The contract between the insured and the carrier being valid, the latter was protected from any action by the insurer. See also *Rintoul* v. *N. Y. Cent. & H. R. R.*, 21 Blatchf. 439.

The case on which the defendant mainly relies, *Carstairs* v. *Mechanics & Traders' Ins. Co.*, 18 Fed. Rep. 473, is readily distinguishable by the important fact, that it was there expressly stipulated that in case of loss the insurance company should be subrogated to all claims against the transporter. When therefore the insured took from the carrier a bill of lading containing a clause similar to that which is found in the case at bar, he made it impossible to do that which he had in terms agreed in the policy issued to him that he would do, and was not therefore entitled to recover upon it. While the contract in terms made with the insurer by the insured could not be modified by him, this presents no reason why he may not modify a right of subrogation, which depends only on his own relations to the carrier, by changing those relations.

There is no ground in the case at bar, upon which any fraud or concealment can be asserted. The receipts which would be given for carriage the defendant well knew would be various, as the cotton would pass through States controlled by different laws. The right of the owner so to contract that the carrier should have the benefit of his insurance, the defendant must have known had been asserted, as it became a subject of judicial decision as early as 1859. *Mercantile Ins. Co.* v. *Calebs, ubi supra.* It made no inquiries, and the plaintiff's officers did not know of the existence of the clause.

Nor can the position of the defendant, that this agreement was within the clause in the policy by which it is agreed that "this insurance shall be void in case the policy or the interest insured thereby shall be sold, assigned, transferred, or pledged, without the consent in writing of the insurers," be maintained. The policy and the interest in it are still retained by the owner; it is neither transferred nor pledged. There is a collateral agreement only, that the carrier, having incurred a liability, shall have the benefit of the insurance that may have been effected.

That the contract between the plaintiff and the carrier was binding and valid being conceded, we are brought to the conclusion expressed in the ruling of the judge who presided at the trial, "that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud and concealment, and where the plaintiff itself was actually ignorant of the stipulation relied on at the time it made the insurance or obtained the indorsement on the policy, and was ignorant when it ordered the cotton that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, making no provision in the nature of a contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract." The defendant has no just ground of complaint against the ruling which was in these terms.

Judgment for the plaintiff.

Leary v. Boston and Albany Railroad.

(139 Mass. 580.)

Master and servant — contributory negligence — consenting to more hazardous employment.

A servant of mature age and intelligence being required by the master to perform duties not embraced in the original hiring, and more dangerous, and undertaking the same through fear of losing his place, but knowing the increased hazard, has no remedy against the master if he is injured by reason of his ignorance or inexperience. (*See note, p.* 787.)

Action for personal injuries by negligence. The plaintiff had been hired and acted as a freight truckman, but at the time of the injury was acting temporarily as a fireman, and was injured by falling from a moving engine by the jolting. The defendant had judgment below.

J. A. Maxwell, for plaintiff.

A. L. Soule, for defendant.

Devens, J. Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience or through reliance on the directions given, fails to perceive or understand the risk and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instructions and cautions sufficient to enable him to comprehend them and to do his work safely with proper care on his own part. But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his

assent dispenses with the duty of the master to take such precautions. *Sullivan* v. *India Manuf. Co.*, 113 Mass. 396; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506.

There was in the case at bar, no defect in the roadway, the engine or other appliances, nor any negligence in the management of them. There was no evidence tending to show that the plaintiff was hurt by reason of any incapacity to understand the character of the employment in which he engaged. He was a man of full age, of ordinary intelligence, and although he had been brought up on a farm, and had ridden but six times in railroad cars, had been in the employ of the defendant for three years loading and unloading cars in its yard and shifting freight in its warehouses. Nor was there any peculiar danger which required to be pointed out to an inexperienced person. That of getting off the engine when it was in motion, or of standing in such a position as to be exposed to be thrown off by its jolting, were entirely obvious; and that the engine was liable to jolt in crossing the frogs and switches, which were numerous in the freight yard, where alone this engine was used for the purpose of moving freight, making up trains, etc., was known to the plaintiff. That the plaintiff must have had full knowledge of all the danger he incurred while acting as a fireman on the engine is fully shown by the fact that he had acted as fireman about twenty times, and from one to three hours each time; and although he testified "that he never got off the engine at any other time when it was in motion except when it was nearly at a standstill," he must have been aware of the danger of being thrown off, or which would attend the attempt to leave it. Upon these facts, it would be correct to rule that the plaintiff could not maintain the action, as no fault or negligence was shown on the part of the defendant.

The facts present another inquiry which heretofore it has not been necessary to decide in this Commonwealth. It is the contention of the plaintiff, that if a servant who is hired for work of a simple character, as in the case at bar, is required by his employer to perform other duties more dangerous and complicated, and although at first constantly objecting thereto, from fear of losing his employment finally assents, makes the attempt, and doing his best, is injured by reason of his ignorance and inexperience, he may maintain an action against his employer for negligence in setting him to work in a dangerous place, even if the plaintiff was aware of the

danger, and might, under some circumstances, be held to have incurred the risks of the employment.

The case of *O'Connor* v. *Adams*, 120 Mass. 427, which the plaintiff deems to some extent to support his contention is distinguishable, as in that case the evidence tended to show that the defendant's agents put the plaintiff to work in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks, or instructing him how to avoid the danger.

In *Railroad* v. *Fort*, 17 Wall. 553, a father, who had consented to the employment of his son by the defendant's foreman as a mere helper, was held entitled to maintain an action when the son was injured by a fall from a great height, to which he had been ordered to ascend, and thus expose himself to danger. It was deemed that the father had a right from his contract to believe that his son would not be thus exposed; and that the son's inexperience and youth prevented him from giving any assent, in taking such a risk, which could avail the defendant. The opinion of Mr. Justice DAVIS recognizes that, if the son had been a person of mature years, even if he had not engaged to do such work, it might well have argued that he should have disobeyed the order, or if he obeyed, that he took on himself the risk of the employment.

In *Lalor* v. *Chicago, Burlington & Quincy R.*, 52 Ill. 401; s. c., 4 Am. Rep. 616, the plaintiff's intestate, a laborer employed in loading and unloading freight cars, was ordered to couple cars by the defendant's superintendent, who knew him to be inexperienced, "unskilled, and unacquainted with the manner of doing such work, when he ordered the deceased to perform it." The fair inference from the facts was that the plaintiff's intestate did not appreciate the danger from his ignorance; and the decision is put on the ground "of misconduct of the company in exposing the deceased to this peril, and when so exposed, in so carelessly mismanaging the engine as to cause his death."

The case of *Jones* v. *Lake Shore & Michigan Southern Ry.*, 49 Mich. 573, which is deemed by the court to be fully sustained by *Chicago & Northwestern Ry.* v. *Bayfield*, 37 Mich. 205, more nearly supports the plaintiff's contention. It was there held, that where the plaintiff was injured while in the employ of a railroad company in the performance of work to which he was wrongly assigned, and which by his original contract he had never agreed to do, he might recover for the defendant's negligence in thus imposing work upon him

which he had not contracted to perform. The plaintiff was a brakeman on a passenger train under a written contract which bound him to no such duty, and was ordered to couple cars, to which he at first objected, but assented to doing it rather than lose his place. In so doing he was injured by reason of his inexperience.

It would seem to have been held that the case was to be decided by determining whether the plaintiff had been guilty of negligence in obeying the order received. While a person who engages for a particular service agrees to encounter only the dangers of that service, he may perhaps, in the first instance, assume that the order given him by his superior is warranted by the legitimate scope of his employment. If so assuming, he is induced to perform duties which by his contract he is not bound to perform, and is thus injured, he should be able to maintain an action for the injury against the employer. But in the case at bar, the plaintiff knew that the duty of aiding as fireman on the engine was not within his original contract as a laborer. He determined to perform it as a part of his engagement with the defendant rather than lose his position as a laborer. In so doing he must be held to have assumed its necessary risks. Such is the doctrine of *Woodley* v. *Metropolitan Ry. Co.*, 2 Exch. Div. 506; s. c., 21 Moak's Eng. Rep. 506.

The plaintiff did this, it is true, rather than lose the position which he had, and which he desired to retain; but by so doing he engrafted this duty on his original contract, of which he made it a part. Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, oy threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service; and if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience. The employer is not necessarily unjust, because he wishes in his employ a servant who can, from time to time, relieve a skilled workman, while his ordinary duties will be those of a

mere laborer. It must certainly be his right to engage a servant, who while his ordinary duties will be simple and expose him to no danger, is willing, as a part of his service from time to time to assume duties which in order to be safely performed require a higher degree of skill, and which expose him to a certain degree of danger.

In the view we have taken we have not deemed it necessary to consider, whether in preparing to leave the engine to light the pipe of the engineer, the plaintiff could be held to be engaged in the performance of any duty due to or demanded by the defendant.

Exceptions overruled.

NOTE BY THE REPORTER.— This doctrine is sustained by *Cummings* v. *Collins*, 61 Mo. 520. The court say: "The defendants are not liable for any injury resulting from causes open to the observation of the plaintiff, and which it required no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render. When a servant of mature years undertakes any labor outside the duties he has engaged to perform, the risks incident to which are equally open to the observation of himself and the master, the servant takes upon himself all such risks."

To the contrary, *Lalor* v. *Chicago, etc., R. Co.*, 52 Ill. 401; s. c., 4 Am. Rep. 616.

In *Jones* v. *Lake Shore, etc., R. Co.*, 49 Mich. 573, A. took service as a brakeman. After awhile he was ordered to do yard work. He objected, but rather than lose his place, complied. In that work of a dangerous character, he received injuries. *Held*, that the company was liable. The court said: "The order referred to did not upon its face purport to make any permanent change in the character of the plaintiff's employment. He remained thereafter, as he was before, a passenger brakeman, with his additional labor added thereto. It is true that the plaintiff could have declined to comply with this order, and it is equally true, as appears from the evidence, that had he done so, he would have lost his position as a brakeman upon the passenger train. I am of opinion therefore that this case comes within the rule laid down in *Chicago, etc., Ry. Co.* v. *Bayfield*, 37 Mich. 205, and that much of the reasoning in the opinion in that case is equally applicable here and need not be repeated." The *Bayfield* case however was that of an inexperienced minor.

Cooley says (Torts, 555): "Where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master, and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the gen-

eral scope of the business. The servant who refuses to obey must consequently take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know when he gave the command, that the servants were not such or so great as the servant had apprehended."

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

FRIEND v. GARCELON.

(77 Me. 25.)

Pension — exemption from creditors.

Pension money is not exempt from claims of creditors after it actually comes into the hands of the pensioner.

BILL in aid of execution. The opinion states the point.

Davis & Bailey, for plaintiff.

A. J. Merrill, for defendants.

PETERS, C. J. The section of the R. S., U. S. (§ 4747), affecting the case is this: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The question is, whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands? A careful examination inclines us to the conclusion that

it does not. The meaning of the section seems to be that the protection is extended so long as the money remains in the pension office or its agencies, or is in course of transmission to the pensioner. It is money "due" or to "become due," and not money collected, that is protected by the law. By another provision of the Federal statutes, a pensioner is not allowed to pledge or sell any right or interest in his pension. The extent of all the interference of the government seems to be, to insure the actual reception of its bounty by the person entitled to it. When the money is actually in the possession of the pensioner the protection is gone.

With the money in his hands as his own unincumbered property, the pensioner stands upon the same footing for its protection as would any other man. He may no doubt purchase with his money any property which our State laws exempt from attachment, and hold it as such. Further than that the guardianship does not extend. He is accountable to his creditors precisely as any other debtor possessing money would be. The counsel for the defendants contend that it does not defraud a creditor for his debtor to give away property which the creditor cannot attach. There can be no doubt of that proposition. The answer is, that the money is exempted from attachment before it is received and not afterward.

Nor would it be very practicable to extend a protection further than before indicated. Certainly the money could not be protected in its transitions from property to property. The moment its identification is gone, the protection confessedly ceases. If the money goes into attachable real estate, such estate may be taken for the pensioner's debts. See *Knapp* v. *Beattie*, 70 Me. 410. There would surely be some ground for saying that there might be an unfairness in extending the protection to the limit contended for. If the money be exempted against any debts, it would be against all attachments and all debts. And the pensioner may have obtained credit from the very fact of the possession of property acquired in this way.

There are decisions favoring our view of the question. The Iowa court has twice affirmed the same view. *Triplett* v. *Graham*, 58 Iowa, 136. In *Webb* v. *Holt*, 57 Iowa, 712, it was said that "the exemption applies only to money due the pensioner, while in course of transmission to him, and that there is no exemption after it

comes into his possession." In *Jardain* v. *Fairton Saving Fund Ass'n*, 44 N. J. Law, 376, the same conclusion was reached, where it is said by the court: "The fund is not placed in the hands of a pensioner as a trust, but it is to inure wholly to his benefit. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work or labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for those of the past, it equally inures to his benefit." In *Spelman* v. *Aldrich*, 126 Mass. 113, it was held that "even if, by the laws of the United States, the pension was exempt from attachment while it remained in the form of a pension check, the exemption ceased after the money was drawn upon the check." *Cranz* v. *White*, 27 Kans. 319, is to the same effect. See s. c., 41 Am. Rep. 408, and note. In *Hayward* v. *Clark*, 50 Vt. 612, a case not directly calling for a decision of the question, a different view is intimated.

It follows that the bill may be sustained upon either of the grounds named in the report.

Case to stand for hearing.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF FAYETTE v. INHABITANTS OF CHESTERVILLE.

(77 Me. 28.)

Evidence — expert — insanity.

A physician not an expert on the subject of insanity may testify as to the mental condition of a patient when he has had adequate opportunity to form an opinion, but cannot qualify himself to testify by a single examination.*

ASSUMPSIT for pauper supplies. The opinion states the case.

Baker, Baker and *Cornish,* for plaintiffs.

Herbert M. Heath, for defendants.

PETERS, C. J. Whether the pauper had mental soundness sufficient to render him capable of being emancipated from parental

* See *Carthage Turnpike Co.* v. *Andrews, ante.*

control by arriving at the age of twenty-one years, and of acquiring a settlement for himself after that time, was one of the questions at the trial of the cause to the jury.

[Other questions omitted.]

An exception is taken to the exclusion of this question proposed by the plaintiffs to their witness, Dr. Martin: "From your examination at that time what, in your judgment, was his (the pauper's) mental condition?" From the manner in which the point is presented to us by the case, we think the ruling must stand.

We infer that the witness was not allowed to answer the question, for the reason that the judge did not think him qualified to testify as an expert. Such must be the implication of the refusal, unaccompanied with explanation. Undoubtedly many physicians are qualified to testify as experts upon questions of insanity. They may not be as a rule of the most eminent class of experts. Whether this witness was qualified to testify as an expert was a question of fact for the presiding judge, and his decision of such a question is usually final. In extreme cases, where a serious mistake has been committed through some accident, inadvertence or misconception, his action may be reviewed. This is not such an instance.

The plaintiffs contend that if not admitted as a professional or practical expert, the witness should have been allowed to express his opinion as a physician who had made a personal examination. The rule excluding persons not experts from testifying to their opinions upon questions where insanity is alleged has admitted, either as an illustration of the rule itself or as an exception to it, skillful and reputable physicians to testify to the mental condition of their patients when they have had adequate opportunity of observing and judging of their mental qualities. That is not this case. Here Dr. Martin was not an attending physician. He made a single examination, *pendente lite*, in order to inform himself as a witness. He stood in a position to be tempted to participate in the prejudices of the party calling him as a witness. See *Gardiner* v. *Farmingdale*, 45 Me. 537.

Finally it is contended that the rule which excludes opinion evidence by witnesses acquainted with the person whose sanity is questioned should be abrogated altogether. We are not prepared to admit the propriety of so radical a change in the practice of our courts, although we are aware that many courts are at the present day inclined that way. It is easy to see, and experience teaches us,

that there are advantages upon either side of the question — to either mode of practice. It is correctly said by those who advocate the admission of such evidence that witnesses who have not some aptitude in narrating events, and ability for describing details and particulars, although possessing good judgment in forming estimates and conclusions, are very often not fairly appreciated; that it is not easy to draw a line between matters of observation and what is a matter of judgment founded on observation.

On the other hand, such evidence is exceedingly apt to carry a force and impression which the real facts are not deserving of. Opinions are easily, and unconsciously to the possessors of them, colored by feeling and prejudice. Every judge experienced at *nisi prius* knows how common a thing it is to see a cloud of witnesses arrayed at the witness stand to testify in a matter of opinion, and how difficult it is to contend against the pressure, however ill-founded the testimony may be. Where it is a collateral question, or where a plain case, the objection to such testimony is not so meritorious, and in such circumstances the objection is not often interposed. But where the issue — sanity or insanity — is directly raised, and the question is a doubtful one, the rule which excludes the opinions of non-professional witnesses, works favorably. The issue is not generally simple enough for a witness to pass his judgment upon. There are various forms and kinds of insanity or mental unsoundness, many of which cannot be easily or accurately defined, the subject itself in some of its aspects being beyond the reach of human investigation. The popular sentiment upon the subject of insanity differs from the legal standard in most cases.

The tendency in our practice has been to allow witnesses who are not experts a good deal of latitude in the expression of opinion, short of declaring their judgments upon the point mainly and directly in issue. As was said by KENT, J., in *Robinson* v. *Adams*, 62 Me. 410: "Certainly nothing less than a distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule." A witness under the direction of the court may be permitted to describe peculiarities, conditions and situations, conduct and changes. In *Robinson* v. *Adams*, *supra*, it was deemed not objectionable for a witness to say that she did not observe any failure of mind and nothing peculiar in a person. In *Stacy* v. *Port. Pub. Co.*, 68 Me. 279, it was held admissible for a witness to testify that a person was intoxicated at a time named.

The motion cannot justly be sustained. There is much to show that the pauper was a man in body and a child in mind.

Motion and exceptions overruled.

WALTON, DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

CHASE v. MAINE CENTRAL RAILROAD COMPANY.

(77 Me. 62.)

Negligence — evidence — presumption as to contributory — railroad crossing.

In an action for death of a traveller on a highway at a railway crossing, there is no presumption that he used due care, and evidence as to his character and habits of carefulness is incompetent.*

ACTION for death of plaintiff's intestate. The opinion states the case. The plaintiff had judgment below.

J. W. Spaulding and *F. J. Buker*, for plaintiff.

Drummond and *Drummond*, for defendant.

PETERS, C. J. The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury and very soon afterward died. He never was conscious enough after the injury to tell how the accident happened. No one was with him at the time. No one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good.

It was said in *Eaton* v. *Telegraph Co.*, 68 Me. 63, 67, that "the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion." See cases

* See *State* v. *Me. Cent. R. Co.* (76 Me. 357), 49 Am. Rep. 622.

there cited. If in civil cases a person's character proves carefulness in one instance, why not in all instances? Where and how can a true line of distinction be drawn? If by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in any case — in all cases? In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer and of every man concerned in the management of the train? If a man who is customarily careful were always so, there would be reason for admitting the evidence. But the issue is, whether the intestate was careful in this particular instance — a fact to be, either directly or circumstantially, affirmatively proved. The objection to such a method of proof is augmented by the fact that the testimony consisted of merely the opinions of neighbors — one generality proving another. But upon what tests or what definition of care are their opinions grounded? The question was not whether the intestate managed his farm, or his shop, or his horses, carefully, but whether he used due care in attempting to cross a railroad track at the very moment when a regular train was due at the crossing. The law imperatively demands that a traveller look and listen before crossing if there is any opportunity to do so. What did these farmer witnesses know about the intestate's habitual care in that respect. It is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary nor secondary importance — it is not evidence at all. 1 Greenl. Ev., § 84.

The question is not a new one in this court. The sole question considered in the case of *Scott* v. *Hale*, 16 Me. 326, was, whether similar evidence was admissible. The defendant there was sued for damages for the loss of a building by fire, the allegation being that the fire was occasioned by the negligence of the defendant. In that case the same arguments were presented as here. The evidence received in that case came nearer the point at issue than the evidence here. At the trial the court permitted witnesses to testify that the defendant was very careful with fire, and that they never discovered any carelessness in him about taking care of his fires during the time they were at his house just before the event complained of. It was held that the evidence was inadmissible, and the verdict was set aside. The same rule has been maintained in

subsequent cases. *Lawrence* v. *Mt. Vernon*, 35 Me. 100; *Dunham* v. *Rackliff*, 71 Me. 345. The case of *Morris* v. *East Haven*, 41 Conn. 252, cited by the defendant, is an especially pertinent and sustaining decision. See *Baldwin* v. *Railroad*, 4 Gray, 333.

Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men," to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable — we are inclined to think the idea intended was presented to the jury too prominently.

Such a consideration is by no means evidence, for if it were so, a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which "taken singly, do not either constitute proof or shift the burden of proof." 1 Best Ev., § 319. It may give character or force to facts already proved. But it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveller, although perhaps not generally in the same degree.

But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts for self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it.

There is no doubt that the intestate was impelled by all his instincts and love of life to save himself when he saw that the horrible danger was upon him. But how the unfortunate man got into the awful situation no one seems to know and no evidence explains to us. It seems to be an unexplainable catastrophe.

Other questions are discussed which may be properly passed. A good deal of discussion is elicited by the ruling that the plaintiff's intestate had a right of passage across the railroad. Perhaps the point may be avoided upon the ground of a license or permission from the defendant company to the public, as was the case in *Barry* v. *Railroad*, 92 N. Y. 289; s. c., 44 Am. Rep. 377.

Exceptions sustained.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

RANDLETTE v. JUDKINS.

(77 Me. 114.)

Tort — assisting escape of thief.

A railway conductor permitting a passenger to travel on his train with goods which the conductor knows to have been stolen, and thus escape, is not liable to the owner, where he did not know that the passenger was the thief nor that the plaintiff was the owner.

THE opinion states the case. The plaintiff had judgment below on demurrer.

J. W. Spaulding and *F. J. Baker*, for plaintiffs.

Drummond & Drummond for defendant.

LIBBEY, J. The declaration in this case is clearly bad for want of a description of the property for the loss of which the action is brought. In trespass or case for the loss of or injury to personal property, the thing taken or injured must be described with reasonable certainty. 1 Ch. Pl. 327; Oliver's Prec. 493, note. Here there is no description. The word "property," the only designation, is the most general that can be used, and it embraces everything susceptible of ownership. But this defect may be cured by amendment.

The great question to be determined is the liability of the defendant, assuming the property to be sufficiently described. The averments in the declaration are in substance that the defendant, on the 21st day of January, 1883, was in the employ of the Maine Central Railroad Company as conductor of the night passenger train from Bangor to Portland; that on the night of that day four men boarded said train run by the defendant as conductor at Richmond, taking and carrying with them on board said train a large amount of stolen property, of the value of $500, which was the property of the plaintiffs; that the defendant knowing said property to be stolen, did willfully, corruptly, negligently and unlawfully permit said men to ride on said train and convey and escape with said property; and that the defendant unlawfully took a portion of said stolen property in payment of their fares. It is not alleged that the four passengers had stolen the property, or that they were unlawfully in possession of it, or that the defendant knew that it was the property of the plaintiffs.

Assuming that the property consisted of chattels, the title to which would not pass by a delivery from a trespasser or thief to one taking for value without notice, does the declaration present a case of liability of the defendant?

If the defendant took a part of the chattels in payment of the fares of the passengers he is liable as a trespasser to that extent; but that is a small matter. The main question is whether the defendant is liable for permitting the four men to travel over the road with the property as their luggage, upon the facts averred in the declaration. If liable, upon what grounds does the liability rest? It is not claimed that there was a privity of contract between the plaintiffs and defendant, by reason of which the defendant owed any duty to the plaintiffs. Did the defendant owe the plaintiffs any duty as conductor of the train or otherwise? If not, he cannot be liable for a negligent performance or omission of it. "A legal duty is that which the law requires to be done or forborne to a determinate person or to the public." Wharton on Negligence, § 24. No such duty on the part of the defendant is averred, unless the law implies it from the facts alleged.

The defendant was conductor of the train. As such it was his duty to direct and control the running of the train, in accordance with the regulations prescribed by the corporation and the requirements of law. The railroad is a public highway over which all

members of the public who are in a proper condition to travel in a public car, who pay the established fare and conduct themselves properly, have a legal right to travel with their luggage. It is the legal duty of the conductor to permit all such persons to enter the cars and travel over the road. For sufficient cause he may stop the train and eject a traveller from the train. He owes no legal duty to the public to stop his train and eject a traveller who is guilty of a felony; or to arrest such traveller and hold him as a prisoner and seize the property he may have in his possession. As a citizen he may have the right, if he sees fit, to arrest a traveller guilty of a felony, and hold him till he can be properly prosecuted; but not being an officer charged with the duty, and having no legal warrant therefor, he is under no legal duty to do so, and thereby take upon himself the burden and hazard of justifying his act. Nor does he owe any duty to any members of the public to arrest a thief and seize and hold the stolen goods he may have in his possession; or to seize and hold for the owner, whoever he may be, goods which a traveller on the road may have taken and is carrying away as a trespasser. At most, under the plaintiff's averments in this case, the four men were mere trespassers carrying away the plaintiff's property, the defendant having no authority from the plaintiffs to interfere with the property in any way. The defendant was not only under no legal duty to take the property, but he had no legal right to do so; for the possession of a trespasser is sufficient to give him the legal right to resist the taking by one having no authority from the true owner. The fact that the defendant took a part of the property for the fares of the passengers created no duty on his part toward the plaintiffs. It makes him liable only for the portion taken.

We have discussed the question involved upon principle, there being no authorities, directly in point, cited by the learned counsel on either side, and it is said there are none. If so the inference is pretty strong that the common law will not sustain an action against a railroad conductor on the facts alleged in this case.

Exceptions sustained. Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

Curtis v. Portland Savings Bank.

(77 Me. 151.)

Gift — savings bank deposit.

At the direction of her aunt four days before her death, the plaintiff took the aunt's savings bank book, and the aunt said: "Keep this, and if any thing happens to me, bury me decently and put a head-stone over me, and pay my debts, and any thing that is left is yours." *Held*, a valid gift *causa mortis*, coupled with the trust.*

ASSUMPSIT. The head-note states the facts.

J. & E. M. Rand, for plaintiff.

Ardon W. Coombs, for defendant.

Virgin, J. When the plaintiff, by direction of her aunt, took the key from the bureau drawer, unlocked the trunk and took therefrom the savings bank book, her aunt said: "Now keep this, and if any thing happens to me, bury me decently and put a head-stone over me, and any thing that is left is yours." This in our opinion constituted a gift *causa mortis*.

The former entry of "subject also to Cath. E. Curtis," which the depositor caused the bank officer to make in March, 1878, in her savings bank book, and also in the book of the bank, showed that she then had in contemplation a gift to the plaintiff, but it was not completed by delivery. *Northrup* v. *Hale*, 73 Me. 66. But on May 30, 1883, only four days before her death, the declaration above quoted, accompanied by the manual delivery of the deposit book, rendered unmistakable her intention. The delivery was sufficient. *Hill* v. *Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231; *Pierce* v. *Five Cents Sav. Bank*, 129 Mass. 425; s. c., 37 Am. Rep. 371; *Tillinghast* v. *Wheaton*, 8 R. I. 536; s. c., 5 Am. Rep. 621.

Nor did the special qualification annexed to the gift defeat it. This was only coupling the gift with the trust that the donee should provide for the funeral of the donor. 2 Schoul Pers. Prop. (2d ed.), § 195; *Hills* v. *Hills*, 8 M. & W., is precisely in point, and has been approved by the court in *Clough* v. *Clough*, 117 Mass. 85.

* See 48 Am. Rep. 787, note.

See also *Davis* v. *Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272. If there are any debts, the plaintiff must see them paid. *Pierce* v. *Five Cents Sav. Bank, supra.*

Judgment for the plaintiff for the amount due on bank book.

PETERS, C. J., WALTON, LIBBEY, EMERY, and HASKELL, JJ., concurred.

EAMES v. SAVAGE.

(77 Me. 212.)

Constitutional law — judgment against town — levy on goods of inhabitants.

A statute authorizing the collection of judgments against towns out of the goods and chattels of the inhabitants is constitutional.

ACTIONS of *audita querela* and trespass. The opinion states the case.

J. J. Parlin and *Strout & Holmes*, for plaintiff.

A. H. Ware and *D. D. Stewart*, for defendants.

EMERY, J. The plaintiff was an inhabitant of the town of Embden, at the time Sarah J. Savage began suit, and recovered judgment against that town in this court. The execution upon that judgment was issued, and was levied upon the plaintiff's goods, pursuant to R. S. of 1871, chap. 83, § 29, now R. S., chap. 84, § 30, which expressly provides that executions against towns shall be issued against the goods and chattels of the inhabitants thereof, and shall be levied upon such goods and chattels. The plaintiff however claims that the statute is forbidden, and made null by the last clause of section 6, of the Maine Bill of Rights, which declares that a person accused shall not "be deprived of his life, liberty, property or privileges, but by the judgment of his peers, or by the law of the land," and also by that clause in section 1, of the fourteenth amendment to the Constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property, without due process of law."

The presumption is the other way, in favor of the validity of the statute, and it is a presumption of great strength. All the judges

and writers agree upon this. Chief Justice MARSHALL, in *Fletcher* v. *Peck*, 6 Cranch, 87, says that to overturn this presumption, the judges must be convinced, and "the conviction must be clear and strong." Judge WASHINGTON, in *Ogden* v. *Saunders*, 12 Wheat. 270, declared that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute. Chief Justice MELLEN, in *Lunt's* case, 6 Me. 413, said: "The court will never pronounce a statute to be otherwise (than constitutional) unless in a case where the point is free from all doubt." This strong presumption is to be constantly borne in mind, in considering the question here presented.

The statute itself in this case has existed for half a century, since February, 27, 1833, but it introduced no new principle or rule in the jurisprudence of this State. It merely affirmed a well known custom or law that had long before existed. The practice of bringing suits against a political division, or municipal organization, and collecting the judgment from the individuals composing it, is believed to have existed in England, and to have been brought thence to New England. Actions against "the hundred," were known as far back as Edw. I, Stat. 13, Edw. I, chap. 2; 3 Comyn Dig. Hundred, chap. 2. As "the hundred" had no property, except that of individuals, the judgments must have been collected from the individuals. In *Russell* v. *Men of Devon*, 2 T. R. 667, Lord KENYON said, that indictments against counties were sanctioned by the common law, though they would be levied on the men of the county. In *Att'y-Gen.* v. *Exeter*, 2 Russ. 45, the chancellor said: "If the fee farm was charged on the whole place called Exeter, he who was entitled to the rent might have demanded it from any one who had a part of, or in the city, leaving the person who was thus called on to obtain contributions from the other inhabitants as best he could." In New England, the practice obtained from the earliest times without any statute. "About the year 1790, one Gatehill was imprisoned on an execution against the town of Marblehead, for a debt the town owned." 5 Dane's Ab. chap. 143, art. 5, §§ 10, 11, p. 158. Mr. Dane, as early as his Abridgement, said the practice was justified "by immemorial usage." Id. Such an imprisonment so soon after the revolution, when the principles of liberty were so freshly vindicated, would never have been permitted, had it not then been a familiar prac-

tice. The practice has been regarded as settled law in Massachusetts, and has been repeatedly alluded to in the opinions of the courts as sanctioned by immemorial usage. *Riddle* v. *Proprietors on Merrimack River*, 7 Mass. 187; *Hawkes* v. *Kennebunk*, 7 Mass. 463; *School Dist. in Rumford* v. *Wood*, 13 Mass. 198; *Brewer* v. *New Gloucester*, 14 Mass. 216; *Marcy* v. *Clark*, 17 Mass. 330, 335; *Merchants' Bank* v. *Cook*, 4 Pick. 414; *Chase* v. *Merrimack Bank*, 19 Pick. 568; *Gaskill* v. *Dudley*, 6 Metc. 546; *Hill* v. *Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332. The constitutionality of the law does not seem to have been really questioned till the case of *Chase* v. *Bank*, 19 Pick. 568, as late as 1837, and its constitutionality was there said to be so well established as not to be an open question. The people of Maine, while a part of Massachusetts, were familiar with the law and the practice. The Maine courts have repeatedly recognized it as long established, and as in harmony with the State Constitution. *Adams* v. *Wiscasset Bank*, 1 Me. 361; *Fernald* v. *Lewis*, 6 Me. 268; *Baileyville* v. *Lowell*, 20 Me. 178, 181; *Spencer* v. *Brighton*, 49 Me. 326; *Hayford* v. *Everett*, 68 Me. 507. Its constitutionality does not seem to have been questioned by the profession till *Shurtleff* v. *Wiscasset*, 74 Me. 130. In Connecticut also the antiquity and constitutionality of the law have been repeatedly affirmed. *Beers* v. *Botsford*, 3 Day, 159; *Beardsley* v. *Smith*, 16 Conn. 368.

That a statute, or rule of law, or custom, has so long existed unquestioned, and has been so often invoked and universally approved and has become ingrained like this in the jurisprudence of a State, is a strong, if not conclusive reason, for pronouncing it constitutional, and a part of the "law of the land." *State* v. *Allen*, 2 McCord, 56; *Sears* v. *Cottrell*, 5 Mich. 251.

The plaintiff urges that such a method of enforcing executions against towns arose out of the early theory that all the inhabitants were parties to the suit, and could appear personally and be heard. It is claimed that when New England towns were first formed, they did not have their present corporate character, that they were an aggregation of individuals, generally owning a large amount of territory in common, and with common rights and common liabilities in respect thereto. These individuals would necessarily be parties in any suit affecting their common liabilities, and execution must have issued against them as individuals. In the progress of time such inhabitants were by statute made "bodies politic and corporate."

Mass. Laws of 1786. Though they continued to be sued by the name of "the inhabitants of the town of ," the individuals no longer appeared in court, but the defense was conducted by the town as a unit through its officers. The argument is, that the town having been made a corporation, and the individual inhabitant debarred from defending personally, he is entitled to his day in court, through some appropriate mesne process, before final process of execution can issue against his private property. It is claimed that a method of enforcing judgments against the inhabitants, which might not have been unjust, when such inhabitants were really parties, has become so, and therefore unconstitutional, since such inhabitants can defend only through a corporate organization. Towns however are not full corporations. They have no capital stock, and no shares. They are only *quasi* corporations — created solely for political and municipal purposes, and given a *quasi* corporate character for convenience only. They remain still an aggregation of individuals dwelling within certain territorial limits, and under the direct jurisdiction of the legislature.

But legislatures in creating purely private corporations have an unquestioned power to prescribe the personal liability of a stockholder therein for corporate debts, and the method of enforcing it. They can limit this liability to the amount of his stock, or to his proportionate share, or can make him liable without limit. Morawetz Corp., § 606, *et seq.*; *Pollard* v. *Bailey*, 20 Wall. 520; *Hathorn* v. *Calef*, 2 Wall. 10. The common method of enforcement is by first recovering judgment against the corporation, and then bringing some specified process against the stockholder. But under such proceedings against him the stockholder cannot question the judgment against the corporation, except for fraud. He is bound by such judgment until reversed. Morawetz Corp., § 619; *Marsh* v. *Burroughs*, 1 Woods, 470; *Milliken* v. *Whitehouse*, 49 Me. 527.

The proceedings against the person alleged to be stockholder are to establish the fact that he is a stockholder, within the statute liability. In some instances the statutes have permitted a judgment creditor of a corporation to determine for himself at his peril (of course indemnifying the officer) what persons are stockholders liable for the debt, and to levy the execution directly on the property of such person without any intermediate process. The question of liability as stockholder would then be tried in a suit against the officer. This latter mode of enforcement, though perhaps

harsher than the other, has been repeatedly held to be constitutional, and we do not know of any case holding otherwise. Morawetz Corp., §§ 618, 619 and notes; *Leland* v. *Marsh*, 16 Mass. 391; *Marcy* v. *Clark*, 17 Mass. 330; *Stedman* v. *Eveleth*, 6 Metc. 115, 124 and 125; *Gray* v. *Coffin*, 9 Cush. 205; *Holyoke Bank* v. *Goodman Paper Co.*, 9 Cush. 576. See also *Merrill* v. *Suffolk Bank*, 31 Me. 57; *Came* v. *Brigham*, 39 Me. 35. In *Penniman's* case, 103 U. S. 714, the statute of Rhode Island authorized the arrest of a stockholder on an execution against the corporation. The constitutionality of the statute was directly affirmed by the State court and was assumed without question by the United States Supreme Court. The principle is analogous to that which permits a creditor holding an execution against A. at his peril to levy directly upon certain goods as the goods of A. without first instituting any process to determine their ownership. If B.'s goods be taken, he has a remedy against the officer, or can successfully resist him. A. is not injured in either event. If the person whose goods are sought to be taken on an execution against a corporation is liable as stockholder for the debt, he is not injured thereby. If he is not liable, he has the same rights and remedies as B.

But the plaintiff urges, that whatever may have been the adjudications heretofore upon this method of enforcing a judgment against a municipal or other corporation by levying upon the property of any member, it is now forbidden by that clause of the fourteenth amendment to the United States Constitution already quoted. He claims that "due process of law" as there used, requires a notice to him personally, and an opportunity for him to be heard in court before execution issues against his property. The general proposition would be that "due process of law" means judicial process with *judex, actor* and *reus*. This proposition may seem to be supported by some general remarks of judges, and writers, but no case in point is cited, nor indeed any direct assertion.

The phrase "due process of law" in the United States Constitution, and in the Constitutions of many of the States, and the phrase "law of the land," in the Constitutions of others of the States, including Maine, have long had the same meaning. 2 Coke's Inst. 50, 51. English political history is full of the strife between the crown and the people, the crown seeking to enlarge its irresponsible prerogatives, and the people insisting on fixed and certain laws. The Magna Charta, and the various bills of rights, in which these

phrases were used were demanded from the kings as safeguards against arbitrary action, against partial or unequal decrees.

The barons and people insisted on general laws, *legum terræ*, on uniformity, "due process of law." They insisted on law however harsh as better security than the prerogative however indulgent. These phrases did not mean merciful, nor even just laws, but they did mean equal and general laws, fixed and certain. The solicitude was to preserve the property of the subject from the inundation of the prerogative. Broom's Court, Law, 228. The English colonies in America were familiar with the conflict between customary law and arbitrary prerogative, and claimed the protection of those charters. When they came to form independent governments, they sought to guard against arbitrary or unequal governmental action by inserting the same phrases in their Constitutions.

They insisted that all proceeedings against the individual or his property should be uniform and by general law. They put the same limitation upon the Federal government in the fifth constitutional amendment. In commenting on these phrases Mr. Cooley cites with approval the language of Mr. Justice JOHNSON, in *Bank of Columbia* v. *Otely*, 4 Wheat. 235: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Cooley Const. Lim. 355. Judge GREEN in *Bank* v. *Cooper*, 2 Yerg. 599 (24 Am. Dec. 523), said: "By 'law of the land' is meant, a general and public law, operating equally on every individual in the community." He also said that such was the opinion of the distinguished Judge CATRON and of Lord COKE. Chief Justice HEMPHILL, in *Janes* v. *Reynolds*, 2 Tex. 251, said: "The terms 'law of the land' * * * are now in their most usual acceptation regarded as public laws, binding upon all the members of the community under all circumstances, and not partial or private laws." O'NEIL, J., in *State* v. *Simons*, 2 Speers, 767, said: "The words mean the common law, and the statute law existing in the State at the time of the adoption of the Constitution.

But it has been expressly decided, that due process of law does not always mean judicial process. The individual's property is

often taken for taxes without his being first warned and heard, and it is nowhere contended now that such summary process is not due process of law. It is the fixed certain process applicable to all, and not partial nor unequal. *McMillen* v. *Anderson*, 95 U. S. 37. Mr. Justice MILLER in the opinion said: "By summary is not meant arbitrary, or unequal or illegal. It (the collection of the tax) must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. In *Murray* v. *Hoboken Land Company*, 18 How. 272, a warrant of distress was issued by the solicitor of the treasury against the collector of New York, upon a certificate of the first comptroller, that the collector was indebted to the treasury. The collector had not been notified nor heard so far as appears. The statute authorizing such a process was held constitutional. Judge CURTIS, on page 276, said: "The Constitution contains no description of those processes, which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." See also *Davidson* v. *New Orleans*, 96 U. S. 97; *Walker* v. *Sauvinet*, 92 U. S. 90.

It does not follow that every statute is the "law of the land," nor that every process authorized by a legislature is "due process of law." It must not offend against "the established principles of private rights and distributive justice." This statute does not. It does not transfer A.'s property to B. It only makes A.'s property liable to be taken for a debt, he in common with others owes to B. A can save his property by paying the judgment against his town, which judgment binds him and all the other inhabitants, and is a judgment he and each of the others ought to pay. Whether he pay or let his property be sold, he can recover full damages of the town, and have the same final process for the collection of his debt. In the end he only pays his ratable share of the common debt. The statute is general, and is uniform in its application to every town and every inhabitant. It may not be in theoretical harmony with other methods of procedure, but it accomplishes its laudable purpose of compelling towns to pay their debts without doing any injustice. Towns readily obtain credit at low rates of interest upon the strength of it, and to now pronounce it void would destroy their credit and work wide-spread disaster among those who have so confidently invested their savings in loans to towns.

The words "due process of law" in the fourteenth amendment

do not have any enlarged nor different meaning from that heretofore ascribed to them. The amendment does not make Federal law and Federal process of law the "law of the land" and "due process of law in each" in each State. Whatever was due process of law in any State before the amendment is due process of law in that State since the amendment. Before the amendment the final determination of the question whether a State statute was according to the law of the land rested with the courts of the State. Since the amendment it rests with the Supreme Court of the United States. It is through this operation of the amendment, that the citizen receives additional protection against unequal and partial laws.

The United States Supreme Court, in considering and determining such a question, will look mainly at the fundamental law and general jurisprudence of the State. If the statute or process is found to be of ancient origin to have been fully acquiesced in to be general in its character, and impartial in its application, and interwoven with the business of the people, that court will not pronounce against it because it is anomalous or has not been adopted elsewhere. The plaintiff cites *Rees* v. *Watertown*, 19 Wall. 107, and *Meriwether* v. *Garrett*, 102 U. S. 472, not as decisive or applicable authorities, but for some general observations in the opinions upon "due process of law." In neither case was there a comparison of a State statute with the fourteenth amendment, and in both cases (19 Wall. 122, and 102 U. S. 519) the New England method of enforcing judgments against municipalities is expressly noticed as an exception to the application of the general observations quoted by plaintiff, and is not even incidentally condemned. Elsewhere in the opinions of the same court, this method has been alluded to as actual, existing and binding law, and nowhere has it even by implication been declared contrary to the New England law of the land, or the fourteenth amendment. *Riggs* v. *Johnson County*, 6 Wall. 191; *Supervisor* v. *Rogers*, 7 Wall. 180; *Barkley* v. *Levees Com'rs*, 93 U. S. 295.

The statute in question must be held to be constitutional and unaffected by the fourteenth amendment.

Judgment for the defendant in each case.

PETERS, C. J. WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

Ex parte Conant. In re Fogler.

(77 Me. 275.)

Statute — "merchant or trader" — dealing in stocks.

An occasional dealing in stocks, outside one's ordinary business, does not constitute him a "merchant or trader" within the insolvent law. (*See note, p.* 761.)

APPEAL from insolvent discharge. The opinion states the case.

C. E. Littlefield, for creditor.

J. E. Hanly, for insolvent.

Libbey, J. The creditor objected to the insolvent debtor's discharge, on the ground that he was a merchant or trader, and did not keep a cash book. The judge of the court of insolvency found that the debtor was entitled to a discharge and decreed accordingly. The creditor appealed to the Supreme Judicial Court, and the case was heard by the presiding judge at *nisi prius,* who affirmed the decree below. The case comes here on exceptions to the rulings of the judge in matters of law.

To sustain his objection that the debtor was a trader, the objecting creditor proved, that during a period of about a year, the debtor, from time to time, bought and sold mining stocks, amounting in all to about $3,500. These transactions were casual, outside of his established business, and independent of it. The judge who heard the case held that these facts did not constitute the debtor a trader within the meaning of the Revised Statutes, chap. 70, section 46. The main question for determination is whether the ruling is correct. We think it is.

One who makes it his business, or a part of his business, to buy and sell goods, merchandise, or commodities, is undoubtedly a trader, within the meaning of the statute. *Groves* v. *Kilgore,* 72 Me. 491; *Sylvester* v. *Edgecomb,* 76 Me. 499. But we find no authorities that hold that speculating in stocks constitutes one a trader. The authorities cited by the counsel, and those which we have been able to find, hold the other way. A trader is defined to be "one who makes it his business to buy merchandise or goods

and chattels, and to sell the same for the purpose of making a profit." Bouv. Law Dic. 594. Shares in stocks are neither merchandise, goods, or chattels. *In re Clelland*, L. R., 2 Ch. 466, it was held that buying and selling stocks did not constitute one a dealer in "goods or commodities" within the meaning of the English bankrupt act, so as to subject him to its provisions.

In re Marston, 5 Benedict, 313, it was held that speculating in stocks did not render the bankrupt a "merchant or tradesman" within the meaning of the United States bankruptcy act, which denied a discharge to the bankrupt, "if being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account." BLATCHFORD, J., in his opinion, says: "Although according to the lexicons, one who is engaged in the business of buying and selling for gain, may be called a merchant, and also a tradesman, yet I do not think it would ever occur to any one to speak of a person carrying on the business which the bankrupt carried on, in the way in which he carried it on, as a merchant, or as a tradesman, nor do I think that those words, as used in the twenty-ninth section, embrace such a person." "A clergyman, or a physician, or a lawyer, might carry on the same business in the same way, in addition to his regular professional business, and no one would call him in consequence a merchant or a tradesman. If not, the bankrupt cannot be so called." It appeared that speculating in stocks was the bankrupt's only business.

The same rule was fully affirmed in *In re Woodward*, 8 Benedict, 563. In this case, the sole business of the bankrupt was that of a speculator in stocks and a stock broker. He was a member of the board of brokers, kept an office, and bought and sold to a very large amount, his liabilities, when he was declared a bankrupt, reaching nearly $3,000,000. In his opinion, BENEDICT, J., says: "Upon these facts, the court has been urged to hold that the bankrupt was a merchant or tradesman, and to refuse the discharge because of his failure to keep proper books of account. But my opinion is that the bankrupt cannot be held to have been a merchant or tradesman within the meaning of the bankrupt law. The words merchant and tradesman involve the idea of dealing with merchandise in some form or other. In their ordinary and natural signification they do not include one who makes profits by buying and selling of shares on speculation, whether for himself or for others. Such a person, in ordinary parlance, cannot be said to be engaged in trade.

No case has been cited which furnishes authority for extending the meaning of these words, so as to include the occupation of this bankrupt. The adjudged cases look the other way. The case of *Marston*, 5 Benedict, 313, is quite in point. It is supposed that the present case differs from the case of *Marston* in that the dealings of this bankrupt were not casual, that he had an office, made contracts in his own name as well as for others, and acquired by his dealings a credit that enabled him to make extensive purchases of stocks. But these circumstances, assuming them to be proved, do not bring him within the statute, for they do not disclose the characteristic feature of the occupation of a merchant or tradesman, namely, a trading in goods, wares, or merchandise."

Our insolvency law was enacted to take the place of the bankrupt law on its repeal, and we think the words "merchant or trader" are used with the same meaning as the words "merchant or tradesman" in the bankrupt law.

It becomes unnecessary to consider the other points discussed by counsel, whether the debtor kept a cash book of his stock transactions, or its equivalent.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

NOTE BY THE REPORTER.—The keeper of a boarding stable is a merchant. *Re Odell*, 17 Bankr. Reg. 73. So is a saloon keeper. *Re Sherwood*, 17 Bank. Reg. 102. But not a brewer. *Josselyn* v. *Pierson*, L. R., 7 Exch. 127. The question was whether a brewer was a "porter or ale merchant." BRAMWELL, B., said: "A merchant of or in an article is one who buys and sells it, and not the manufacturer selling. A wine grower is not a wine merchant; even a wine importer is not called a wine merchant, but a wine importer. * * * The brewer is a man who deals with the ale and porter merchant, not one who competes with him." PIGOTT, B., said: "The distinction is the same that exists between a horse breeder and a dealer, or between a farmer and a meat salesman."

A "drummer" or commercial traveller is not a merchant, because he does not sell his own goods. *Ex parte Taylor*, 58 Miss. 478; s. c., 38 Am. Rep. 336.

In *Murray* v. *State*, 11 Lea, 218, it was held that a merchant tailor is a "merchant." The court said: "The facts proven on the trial were, that the defendants were copartners and carried on the business of merchant tailors in Memphis. They kept on hand a stock of goods, which they purchased outside of the State, and made them up into clothing and sold them upon orders of their customers. When a customer desired a suit of clothes or a garment they permitted him to select from their stock the particular piece of cloth or

stuff he desired them made of, and they took his measure and made up the articles of clothing and sold them to him. They kept in their employ tailors for the purpose of making up their goods into clothing for their customers, whom they charged for the cloth of which the clothing was made, as well as for the labor and skill of making them up. * * * During the time they had license they would sometimes sell a piece of cloth, or some article of trimming or buttons to a customer without being made up, but since they had failed to take out a license they had ceased to sell any articles unless made up into clothing. * * * We think there can be no question but that the defendants were merchants within the meaning of the statute above quoted, and were bound to obtain a license in order to carry on business in the manner above stated."

A coal and oil mining association is not a mercantile one. *Com.* v. *Natural Gas Co.*, Penn. Com. Pleas. The court said: "Who then is a merchant? Tomlins' Law Dictionary (edns. of 1796 and 1835), defines him as 'one who buys and trades in any thing,' adding, 'but every one who buys and sells is not at this day under the denomination of a merchant; only those who traffic in the way of commerce by importation or exportation, or carry on business by way of emption, venditition, barter, permutation or exchange, and who make it their living to buy and sell by a continued assiduity or frequent negotiations in the mystery of merchandising, are esteemed merchants.' Abbot's Law Dictionary describes him as 'one whose business it is to buy and sell,' and Bouvier uses the same language, adding, 'this applies to all persons who habitually trade in merchandise.' Webster among other definitions gives these: 'one who buys goods to sell again; and one who is engaged in the purchase and sale of goods." (See also Soule Eng. Syn., *Merchant, Mercantile Trade;* Smith Syn. Discrim., *Commercial Trade;* and the dictionaries of Richardson, Johnson, Walker and Webster under the words italicised. The leading idea in all the definitions of a merchant, whatever restriction as to the kind and extent of his business has sometimes been thought necessary to justify the use of the word, is of one who both buys to sell again, and who does both not occasionally or incidentally but habitually and as a business. This view of the subject is taken also by the Pennsylvania authorities. *Norris* v. *Commonwealth*, 3 Casey, 494; *Commonwealth* v. *Campbell*, 9 Casey, 380, to which may be added *Barton* v. *Morris*, 1 W. N. C. 543, decided in 1875 by Judge Biddle and acquiesced in, no doubt, because of his clear and satisfactory reasons. It seems plain therefore that a 'mercantile' partnership is one which habitually buys and sells, which buys for the purpose of afterward selling, and that a business such as is conducted by the defendant is not mercantile. Surely that word would not properly describe an association which mined and sold ore and coal from its own lands, or sank oil wells and sold their product, and we see no difference between the production and sale of such substances so far as this controversy is concerned, and the business now in question."

LOCKWOOD COMPANY v. LAWRENCE.

(77 Me. 297.)

Water and water-course — fouling stream — joint actors — injunction.

Where several riparian owners, acting independently, discharge refuse from their mills into a stream to the injury of a lower proprietor, an injunction may issue in a suit against all and before any action at law.

BILL for injunction. The opinion states the case.

Edmund F. Webb and *Appleton Webb*, for plaintiff.

Brown & Craven, J. W. Spaulding and *F. J. Buker*, for respondents.

FOSTER, J. The bill alleges in substance that the complainants are the owners and in possession of a large amount of real and personal estate, consisting of lands, dams and water-power, including mills and machinery employed in manufacturing cotton into fabrics, situated at Waterville, on both banks of the Kennebec river, not navigable for vessels or boats at that place, their dams extending across said river; that in 1874 they built a manufactory of thirty-four thousand spindles, and in 1882 another of fifty-five thousand spindles, both of which have been in use since their erection, and that in said business they have a capital of $2,200,000, employing more than one thousand persons, with a pay-roll of about $2,500 each day, and an annual production of $1,300,000; that they are entitled to the natural flow of the water in said river, and to have it come to their manufactory in its natural purity. And they allege that the respondents during the past six years have severally owned and operated large saw-mills, containing shingle, clapboard and other manufacturing machines, and planing-mills, and shovel handle mills, situated above the complainants on said river between and including Skowhegan and Fairfield, which they are respectively and separately operating, by means of which the refuse material, saw-dust, edgings, shavings, refuse wood and other debris arising therefrom are discharged therefrom into said river, and vast quantities are carried by the current down the river, and before reaching the complainants' premises it commingles into one indistinguish-

able mass, and thus uniting, flows along said river into their ponds, raceways, racks and wheels, filling the same and thereby stopping the wheels and retarding and preventing the running and operating of their manufactory, whereby they lose the benefit, advantage and profits of the same, rendering it necessary to expend large sums of money in removing this waste and debris, causing great damage, constituting a great nuisance which is rapidly increasing and becoming more intolerable, which operations are still continued and will be continued, and that a destruction of complainants' profits and irreparable injury will result, unless the respondents are restrained by injunction; that each respondent is independently working his own mill without any conspiracy or preconcert of understanding or action with the others, and it is impossible to distinguish what particular share of damages each has inflicted or will inflict, but that each has contributed, and is now contributing to constitute the nuisance, making an unreasonable use of the water of said river, destroying its value, illegally interrupting the complainants in its use, and rendering it unfit for manufacturing purposes; and that they have no remedy, except in equity.

The prayer is for a perpetual injunction restraining the respondents from depositing waste, enumerated in the bill, in said river.

The answer substantially sets forth admission of title and possession of the premises of the parties as alleged, and claiming that the respondents were severally operating such mills, manufactories and machinery as alleged, which are used to manufacture lumber owned by most of the respondents, and cut near the head-waters of the Kennebec; that most of the respondents own large tracts of timber land situate in the northern part of the State, and have invested in said lumbering business large amounts of money, and employ annually a large number of men in cutting, hauling, driving, booming and sawing said lumber, their business having continued for more than thirty years, and having become of very large proportions, furnishing employment for a large proportion of the laboring men living on the Kennebec river; that said mills and manufactories were all located where they now are more than thirty years ago, having been operated during all that period in the same places and manner as now, and that there have always during said time been thrown into said river whatever refuse materials the occupiers of said mills saw fit, consisting of slabs, edgings, shavings and all other refuse materials of various kinds evolved from said operations, but

with much less quantity during the past six years, and only so much as with proper care and caution on the part of complainants to protect their manufactories, would do no injury to them, and that the respondents have acquired a prescriptive right to use said river as they have heretofore done; they deny that during the past six years, any refuse or waste from their mills has been unlawfully deposited in said river, or unlawfully interfered with the complainants' rights, and that whatever damage or annoyance they have suffered is attributable to the improper construction of their dams, flumes, racks, wheels and other apparatus used in carrying on their manufactories; that the granting of the prayer of complainants as set forth will prevent the respondents from operating their mills, and destroy their lumbering business. They also deny that the allegations of the bill entitle the complainants to equitable relief, and claiming all benefit of demurrer in their answer to this part of the bill, say that it cannot be maintained against these respondents jointly, they being as therein alleged engaged independently of each other in operating their several mills, manufactories and machinery, and with no conspiracy or preconcert of understanding or action with each other.

I. The case is one of importance, as it embraces the rights of parties in property of great value on each side, and in the lawful management and enjoyment of which each party is entitled to protection by law. It is one also that in its proper consideration is not entirely free from difficulties. The parties have interests, which in the management and enjoyment of their property are conflicting; and while it becomes the duty of the court to settle their respective rights, we must be governed by the established rules and principles of equity, and which in their general operation are just and salutary.

1. The question to be first considered is the objection raised in the answer, with the force of a demurrer, to the joinder of these several respondents in this bill. It is insisted that the cause of action is distinct and several as against each of the respondents, and that neither they, nor the several cases of action, can be joined in the same bill, and that the objection by demurrer is fatal on account of misjoinder and multifariousness.

While it is true that the allegations in the bill set forth that each respondent is independently working his own mill and machinery, without any conspiracy or preconcert of understanding or action with the others, it also appears that the refuse material, sawdust,

edgings, shavings, refuse wood and other debris arising from operating said mills, cast and deposited into the river, are carried down by the current, and before reaching the complainants, commingle into one indistinguishable mass, and thence are carried down into the ponds, raceways, racks and wheels of the complainants' manufactories, inflicting the injury of which they complain, and that it is impossible to distinguish what particular share of damage each respondent has inflicted, or will inflict, but that each has contributed and now is contributing to constitute the said nuisance. In considering the questions thus raised by the pleadings upon this branch of the case, and assuming the facts set forth by the allegations in the bill to be true, no other conclusion can be reached than that the respondents, though acting independently of each other as alleged, all deposit the refuse material and debris arising from the operation of their mills into the same stream, whence by the natural current of the water it is carried down the river and commingles before reaching the complainants' ponds, raceways, racks and wheels, where the nuisance complained of is committed. This commingling of the waste thus thrown into the stream, and which after thus uniting and commingling, is precipitated by the current upon the premises of these complainants, creating the nuisance and inflicting the injuries of which they complain, is the natural and necessary consequence of the several and independent action of these respondents. It is the combined action of this waste from the different mills, uniting and mingling, and thence drifting down upon the complainants, which creates the nuisance, and produces the injuries complained of.

Whatever then may have been the act of these different respondents, either in the operation of their several mills, or in the depositing of the waste and debris arising from such operations, into the stream, there is a co-operation in fact in the production of the nuisance. They all claim a right to discharge the waste and debris from their mills into this river, and in this, their claim constitutes one common interest, though not a joint right. The acts of the respondents may be independent and several, but the result of these several acts combines to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action. It is otherwise in law where damages are sought to be recovered. There only those parties can be joined who have acted jointly in the commission of the act. There must be concert of

action and co-operation to make several persons jointly liable in an action at law. "There is a very great difference," says the court in *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 8 Sawy. 628, "between seeking to recover damages at law, for an injury already inflicted by several parties acting independently of each other, and restraining parties from committing a nuisance in the future. In equity, the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with, with respect to his own acts, either as affected or unaffected by the acts of the others. It is not necessary for the prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all."

This question has recently been before the court in California in the case of *Keyes* v. *Little York Gold Washing Co.*, 53 Cal. 724, where a different doctrine was laid down, and in support of that claimed by the counsel for the respondents. But that case may be considered as substantially overruled by the more recent decision of *Hillman* v. *Newington*, 57 Cal. 56, a case in the same court, sustaining the views which we entertain in the case before us.

Again the same question arose in that State and was decided as late as 1883 in the Circuit Court of the United States in the case of *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 8 Sawy. 628. In that case, the complainant was the owner of lands situated on the Yuba and Feather rivers; the respondents were miners severally and independently engaged in hydraulic mining at points above on the Yuba river and its affluents, and by means of which large quantities of gravel, waste, earth and other debris arising therefrom were discharged into the several streams on which the mines were situated, and by the rapid currents of the water were carried down the various streams into the Yuba river, where they commingled before reaching the valley, and after thus uniting flowed along the main Yuba river, and were deposited upon the complainant's lands. An injunction was sought to restrain the several respondents from depositing the debris of their mines where it would be swept into the river. The respondents demurred to the

bill. In that case as in this no damages were sought, but equitable relief to restrain future action — future contribution by each to the alleged nuisance. Judge SAWYER held that the bill could be filed against all the respondents who contributed to produce the injury by depositing debris in the stream above, and denied the doctrine of *Keyes* v. *Little York Gold Washing Co.*, as not being "in accordance with the principles of equity jurisprudence in England or generally in the United States as established by the authorities."

Another recent case is that of *Blaisdell* v. *Stephens*, 14 Nev. 17; s. c., 33 Am. Rep. 523, which was a combined suit at law, to recover damages which had already resulted from a nuisance, and in equity for an injunction to restrain its continuance. There were two respondents, who each, separately and independently of the other, allowed water to run from his land upon the land of the complainant, and from the combined action of which the complainant's ditch was injured, which constituted the nuisance complained of. There was a joint judgment for the damages, and an injunction from which an appeal was taken to the Supreme Court, where it was held that the acts of each party being independent of the other, there was no joint liability for the damages, reversed the judgment and ordered a new trial. Upon a rehearing it was claimed, that even if the judgment at law for damages could not be maintained, it was a proper case for equitable relief, and the court held, in accordance with the authorities, that there could be no joint recovery at law for damages, but that it was a proper case for an injunction; the case was remanded, with directions that if the damages which had been recovered at law should be remitted within fifteen days, the decree for injunction should stand. In that case, the principle is clearly recognized and adopted, that parties who by their several and independent acts contribute to the production of a nuisance, although they cannot properly be joined in an action at law for damages, may be rightfully joined in a suit in equity for injunction to restain a future contribution by each to the nuisance.

"There is a common interest," says SAWYER, J., in *Woodruff* v. *North Bloomfield Gravel Mining Co.*, *supra*, "a common, though not a joint right claimed; and the action on the part of all defendants is the same, in contributing to the common nuisance. The rights of all involve and depend upon identically the same question, both of law and fact. It is one of the class of cases like bills of peace, and bills founded on analogous principles, where a single

individual may bring a suit against numerous defendants, where is no joint interest or title, but where the questions at issue, and the evidence to establish the rights of the parties and the relief demanded are identical."

Professor Pomeroy, in his recent work (Pom. Eq. Jur., §§ 269, 1394), after an exhaustive examination of the authorities in the American courts, sustains the doctrine on the ground of prevention of multiplicity of suits in bills of this nature, which are not technically "bills of peace," but "are analogous to," or "within the principle of" such bills. "Courts of the highest standing and ability," says the learned writer, "have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

The same principle is expressly recognized in *Chipman* v. *Palmer*, 77 N. Y. 56; s. c., 33 Am. Rep. 566, where the court say that "an equitable action will lie to restrain parties who severally contribute to a nuisance," while it holds that they cannot be joined in an action at law. To the same point are *Duke of Buccleugh* v. *Coman*, 5 Macp. 214; *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; *Thorpe* v. *Brumfitt*, L. R., 8 Ch. App. 650.

In the last case a bill was sustained, and a decree granting a perpetual injunction affirmed, against several persons acting individually and severally in obstructing the passage to an inn by loading and unloading wagons. Lord Justice JAMES said: "Then it was said that the plaintiff alleges an obstruction, caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose a person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to use the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he does causes no damage to the complainant."

In the case at bar it may be that the act of any one respondent alone might not be sufficient cause for any well-grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result and not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance, as we have before stated. Hence there can be no well-founded objection, either upon principle or authority, against this bill upon the ground of misjoinder.

2. The same may be said in relation to the objection urged on account of multifariousness. Here the same relief is asked against all; the same common right is claimed; the same general acts are alleged against all as contributing to the same nuisance. When the object of the bill is single, to establish and obtain relief for one claim in which all the respondents may be interested, it is not multifarious although the respondents may have different and separate interests. *Bugbee* v. *Sargent*, 23 Me. 269; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 157. If the matters are in any material degree blended, so that directly or indirectly they concern all the respondents, the bill is not multifarious. Drewry Eq. Plead. 42. In *Campbell* v. *Mackay*, 1 M. & C. 543, Lord COTTENHAM held that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstances of some of the defendants being subject to distinct liabilities, in respect to the different branches of the subject-matter, will not render the bill multifarious. *Gaines* v. *Chew*, 2 How. 642.

Therefore, whether the case before us, as disclosed by the allegations, may or may not be exactly like any other that has come before the courts, we are satisfied that it falls within the principles of equity enunciated in the cases to which we have referred, and which are not only salutary, but in accordance with reason, and that the bill is not objectionable on account of misjoinder of respondents or multifariousness.

3. The next objection urged is that upon the allegations set forth in the bill the complainants show no sufficient grounds to entitle them to equitable relief.

The relief granted by a court of equity is either remedial or preventive. In this case the complainants' prayer is for preventive relief only. It may well be assumed that the facts stated are sufficient to constitute the case of a private nuisance, and to give this court *prima facie* jurisdiction over the subject-matter and the parties. It is well settled that private nuisances may, under some circumstances, fall within the jurisdiction of a court of equity in reference to obtaining relief from further molestation by restraining the acts which constitute the nuisance.

Nuisances and injuries affecting waters, including the obstruction, diversion or pollution of streams, afford frequent ground for equitable interference, on the principle of restraining irreparable mischief. The jurisdiction of equity in this class of cases may be regarded as ancient and well established. Especially is this true when the acts complained of are of such a character that irreparable injury will result to the complainant without such interference, or when adequate compensation for the injury arising therefrom may not be obtained at law, or if continued, would lead to a multiplicity of suits. Whenever this is admitted, or established by proof, a court of equity may, by injunction, restrain the continuance of such acts. *Canfield* v. *Andrews*, 54 Vt. 1.

It is true that "it is not every case which would furnish a right of action against a party for a nuisance which will justify the interposition of a courty of equity to redress the injury or remove the annoyance." Story Eq. Jur., § 925. And the general rule, as claimed by the learned counsel for the respondents is, that where a nuisance is claimed to exist the fact of its existence should ordinarily be established by a suit at law before a court of equity will interfere. This rule however is not without exceptions. The ground upon which equity takes jurisdiction is that the injury complained of is irreparable, or of such a nature that there is no adequate remedy at law. An examination of the cases which sustain the doctrine of the necessity of the prior interposition of an action at law, shows that in cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed, or there is no adequate remedy at law, equity will intervene. *Varney* v. *Pope*, 60 Me. 195; *Porter* v. *Whitham*, 17 Me. 294; *Morse* v. *Machias Water Power Co.*, 42 Me. 127, 128; *Parker* v. *Winnipiseogee Lake Co.*, 2 Black. 552; *Coe* v. *Winnipiseogee Manuf. Co.*, 37 N. H. 263; Gould Waters, § 506, and cases cited.

As stated by Chancellor KENT in *Gardner* v. *Newburgh*, 2 Johns. Ch. 165: "The foundation of jurisdiction in such a case is the necessity of a preventive remedy when great and immediate mischief, or material injury, would arise to the comfort and enjoyment of property." The fact that the complainant has not established his right at law is no ground for demurrer to the bill. *Soltau* v. *De Held*, 2 Sim. (N. S.) 133; *Robeson* v. *Pittenger*, 1 Green Ch. 57; *Holsman* v. *Boiling Spring Co.*, 1 McCarter, 335; *Olmsted* v. *Loomis*, 9 N. Y. 432.

And by irreparable injury is meant one for which there is no adequate remedy at law. Gould Waters, § 508. "To deprive a plaintiff of the aid of equity by injunction it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown, a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law." 1 High Inj., § 30; *Boyce's Ex'r* v. *Grundy*, 3 Pet. 215. Especially is this the case where the injury is of such a nature as from its continuance or permanent mischief must cause a constantly recurring grievance, which cannot otherwise be prevented. Adams Eq. 211; *Belknap* v. *Trimble*, 3 Paige, 601; *Webber* v. *Gaye*, 39 N. H. 186, 187; *Merrifield* v. *Lombard*, 13 Allen, 18; *Cadigan* v. *Brown*, 120 Mass. 494. In such case an action at law affords no adequate remedy, and vexatious litigation and multiplicity of suits, which equity seeks to avoid, would afford just grounds for equitable interference. *Clark* v. *Stewart*, 56 Wis. 154. The very difficulty of obtaining substantial damages was stated to be a ground for relief by injunction in *Clowes* v. *Staffordshire Potteries Co.*, L. R., 8 Ch. App. 125. With still greater force does this apply in a case where the injury is caused by so many, and in such a way that it would be difficult, if not impossible, to apportion the damage, or say how far any one may have contributed to the result, and so damages would be but nominal, and repeated actions without any substantial benefit might be the result.

In *Lyon* v. *McLaughlin*, 32 Vt. 423, the court say: "When the invasion of a right in this kind of property is threatened and intended, which is necessarily to be continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is

not only permissible, but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. The very doubtfulness as to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the sense of the law relating to this subject."

The court in Massachusetts has very recently had occasion to allude to this question in a case relating to the rights of riparian owners where the waters in a natural stream were polluted, in which case the court say: "The defendant contends, that according to the general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiff's material injury. *Merrifield* v. *Lombard*, 13 Allen, 16; *Woodward* v. *Worcester*, 121 Mass. 245. The acts of the defendant, as alleged, tend to create a nuisance of a continuous nature, for which an action at law can furnish no adequate relief." *Harris* v. *Mackintosh*, 133 Mass. 230.

Equity as well as the common law has growth. It is said that prior to Lord ELDON'S time injunctions were rarely issued by courts of equity, but that with the development of equity jurisprudence it has become of frequent use. In the earlier history of the jurisprudence relating to this branch of the law, it was rarely issued in the case of a private nuisance until the plaintiff's right had been established in a suit at law. "But now," say the court in *Campbell* v. *Seaman*, 63 N. Y. 582; s. c., 20 Am. Rep. 567, "a suit at law is no longer a preliminary, and the right to an injunction in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits."

II. It remains then to be determined from the pleadings and proof whether the allegations are so far supported by the testimony as to entitle the complainants to equitable relief.

A large mass of testimony has been taken in support of the claims set up in the bill, and particularly in reference to the amount of waste that has been discharged into the river from the respondent's mills, and which to a greater or less extent has lodged in the

nds, racks, wheels and raceways of the complainants' mills, thereby causing damage and injury to their property and business, and of which they complain. Much of this testimony is uncontradicted, and fully sustains the allegations in reference to the amount and kind of waste from the respondent's mills — situated at Fairfield and Somerset Mills — and with which the water coming into the complainants' ponds is polluted. It is unnecessary to enumerate all the facts established by the testimony. The proof shows that the canal or pond, which is about seven hundred feet long, ninety feet in width, and from fifteen to twenty feet deep, situated at the westerly end of the complainant's dam, was so filled with waste during the space of about six weeks preceding the taking of this testimoney — March 25th to May 12th — that the complainants were obliged to clear it out from six to eight times, and that several hundred cords were thus removed during that time besides the large quantities that had accumulated and obstructed the raceways. It also shows that they were thus continually troubled with it, and were obliged to shut down their mills on account of it from one to sixteen times a day, and at times whole days, and to employ from ten to forty and sometimes fifty men in clearing the racks and removing this waste, at an expense, for that alone during the time named, of more than $2,000; occasioning a loss to the employees in their mills, during the month of April, of $8,000 on account of the loss of time resulting from the frequent shutting down of the mills, thereby causing trouble and dissatisfaction. That this had been troubling them every year in the same way since commencing operations in 1876, more at some seasons of the year than at other times, but that it had continued each year, notwithstanding they had requested the respondents to cease throwing their waste into the river, and had obtained an act from the Legislature prohibiting the throwing of waste and *debris* into this river, and that they had already on account of this waste been damaged between forty and fifty thousand dollars, and that it was continuing and liable to continue in the future with increasing damage each year.

The proof further shows that the waste which causes this trouble consists of great quantities of refuse material, sawdust, edgings, shavings, and other *debris* arising from the operating of respondents' mills in the manufacture of more that twenty-five millions of lumber annually, besides various other manufactures. It is cast and discharged into the river, and before reaching the com-

plainants' premises commingles and is carried by the action of the water down into their ponds, racks, raceways and wheels, causing the nuisance complained of.

It appears in proof also, that the respondents, and those preceding them, have been accustomed to discharge the waste from their mills into this river for many years, and although they do not strenuously controvert the fact of the great damage to the complainants, they claim that what they do in thus disposing of their waste is but a reasonable use of this river; and if not, then that they have a prescriptive right so to do, and that the complainants contribute to the production of such injury by improperly constructed dams, canals, racks, etc.

From a very careful examination of the testimony we are satisfied that neither of these propositions can be supported by it.

1. These parties are riparian proprietors. They represent the great and important manufacturing industries of our State. While the complainants have a capital of more than $2,200,000 invested in the manufacture of cotton, producing $1,500,000 annually, the respondents have invested above them upon the same river in the manufacture of lumber, more than $250,000, and whose annual production is more than $600,000.

However great these industries, or however important to either may be the result of this suit, the rights of the parties to the use of the water in that river are established by well settled principles.

Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts. Any diversion or obstruction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those thereby injured are entitled to a remedy. *Merrifield* v. *Lombard*, 13 Allen, 17.

It is laid down by the courts that the general principles governing the use of running streams in respect to the diversion, obstruction, or detention of water, must also govern in respect to the amount of waste resulting from the process of manufacture. The reasonable use in such cases depends upon the circumstances of each particular case. The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian proprietor. For domestic, agricultural and manufacturing purposes, to which every riparian owner is entitled, there may be, consistently with that right, some diminution, retardation or acceleration of the natural flow. So in regard to the use of the stream for manufacturing purposes, there must necessarily be more or less waste which it would be impossible to exclude from it, and which by no ordinary care or prudence could be prevented from falling into the stream. The reasonableness of such use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below. See *Hayes* v. *Waldron*, 44 N. H. 580. In the recent case of *Red River Roller Mills* v. *Wright*, 30 Minn. 249; s. c., 44 Am. Rep. 194, the court say: "In determining what is a reasonable use, regard must be had to the subject-matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases, and all the other and ever varying circumstances of each particular case bearing upon the question of the fitness and propriety of the use of the water under consideration."

This case is before us upon report, and it becomes the duty of the court to determine this question of use. All the evidence upon the question of reasonable use, together with all the various circumstances connected with the use of this river by these riparian proprietors, in operating their different mills and manufactories, becomes important in the determination of their respective rights. It is claimed on the part of the respondents that the deposit of a great portion of the waste and refuse material arising from the different manufactures at their mills, into the river, is necessary to

their successful operation, and that the expense and inconvenience to which they would necessarily be put in otherwise disposing of it, would necessitate the shutting down of their mills, and result in a suspension of their business in the manufacture of lumber and other materials. On the other hand, the complainants, as lower proprietors upon the same river, claim an equal right in the use of the water, and from the evidence show that they are and have been greatly injured in the use of their property on account of this same waste and refuse material deposited above them by these respondents.

The evidence is such as to leave no doubt in our minds that the use which the respondents have made and are making of this river in reference to the rights of these complainants is other than a reasonable use of it. What may have been a reasonable use at one time may not be said to be a reasonable use now. The state of the country, the state of improvement in regard to mills and machinery, and the use of this river as a propelling power were once far different from what they are to-day. And so in considering the reasonableness of suffering this waste to be deposited in the current above, much must depend upon the use to which the stream below is applied, and the detriment caused to those whose rights, as riparian proprietors, are entitled to just consideration.

The complainants' cotton mills were built, one in 1874, and the other in 1882, where formerly was a saw and grist-mill and at one time a tannery. The racks and wheels which are now connected with these cotton mills, as the proof shows, are of standard and approved construction, and yet very different from those that formerly existed there. The old mills gave way to the advance in manufacturing interests, and to the improvement in the propelling power and machinery necessarily incident to such manufactures.

The vast quantities of *debris* and waste brought into the complainants' canal, and which they are obliged to remove, thereby seriously interfering with the profitable use of their mills, causing frequent suspension of operations, and occasioning the damage and annoyance to which we have before alluded, justifies us in the conclusion that such is not a reasonable use of this river by the respondents. And we are equally satisfied, that while it is of great convenience for them thus to dispose of their waste, and considerable expense and great inconvenience would be occasioned by any other disposition of it, it is not absolutely necessary to the opera-

tion of their mills that it should be thus deposited in the stream. Other manufacturers of lumber, not only on the Penobscot, but on other principal rivers in this State, dispose of their waste in other ways than by allowing it to pass into the streams. It was otherwise at ne time. But the state of improvement of the country, and the springing inte existence of other industries have each had a qualifying influence in determining the reasonable use of such waters.

2. Again. The respondents, claiming a special right to the use of this river, more beneficial to themselves and more burdensome to the riparian proprietors below than the natural right to the reasonable use of it must establish such right, either by grant or prescription.

[Omitted.]

From a full consideration of this case it is clear that they have been guilty of an infraction of the complainants' rights; and that from the allegations in the bill, and the proof in support of the same, the latter are entitled to equitable relief. This relief however should be against those parties who are shown to have contributed to the injury.

We are not satisfied that the three respondents whose mills are situated at Skowhegan have contributed to the injury complained of.

As against the other respondents a perpetual injunction should issue in accordance with the prayer in the bill enjoining them from casting or depositing in the Kennebec river, above the complainants' dams and manufactories, any refuse materials, edgings, shavings, debris, wood refuse and what is denominated long sawdust — not including however common sawdust. In regard to common sawdust we do not feel satisfied, that at this time, it should be held to be productive of the nuisance; nor should the complainants be prejudiced as to any future action concerning that under other circumstances, or upon other evidence.

Neither should this injunction issue immediately. The respondents must have a reasonable time in which to prepare for the disposal of such waste as is inhibited from going into the river.

Bill dismissed as to Washington B. Bragg, Levi B. Weston and Charles M. Brainard, without prejudice, and without cost for them. Bill sustained as against all the other respondents named therein with costs, and against whom perpetual injunction is to issue, in accordance with this opinion, at the end of four months from the

time the rescript in this case shall be received by the clerk of the district in which this suit is pending. Costs to be equally apportioned between the eight different firms represented by the sixteen respondents.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

STRATTON v. STRATTON.

(77 Me. 373.)

Marriage — divorce — alimony — husband's death.

Where alimony is decreed in terms for the natural life of the wife, it subsists even after the defendant's death.

ACTION for alimony. The opinion states the point.

W. P. Young, for plaintiff.

Baker, Baker & Cornish, for defendant.

FOSTER, J. In 1860, at the March Term of this court for the county of Kennebec, cross libels for divorce were pending between this plaintiff and her husband. During the pendency of the husband's libel, and prior to said term of court, the parties thereto entered into an agreement in writing, signed by each of them, that in case a divorce should be decreed upon said libel, two referees named in said agreement should determine what the libellee should receive from the libellant, in what way and manner, how it should be secured to her, and how she should receive it. It was also agreed that the report of the referees should be made a part of the decree of the court, and should be binding on the parties, and enforced as such. The referees accordingly heard the parties, and made their report to the court. Their award, which together with said agreement was extended upon the records and made a part of the proceedings in said action, provided, among other things, that the said libellant should pay to the libellee—the present plaintiff—"during her natural life, an annuity of $250, to be paid quarterly in advance," etc. Upon the same day of the said March Term, a divorce was decreed to each libellant in each of said actions; in that

wherein the husband was libellant, the court "ordered that alimony, according to the award of Nathan Western and Lot M. Morrill on file, be received and paid as therein provided."

From that time forward till April 2, 1881, the plaintiff received the sum thus awarded and ordered by the court to be paid; since which time nothing has been paid to her. William M. Stratton died August 6, 1883, and this action of debt upon judgment is brought against the administrator of his estate, to recover the installments accruing since the last payment, both prior to and since the death of said William M. Stratton.

The defense set up is two-fold; first, that the court had no jurisdiction to grant alimony, and therefore that the judgment is void; and second, that the court had no authority to grant alimony beyond the life-time of said William M. Stratton, and that said judgment became inoperative and void at his decease.

[Omitting the first question.]

II. The court, in adopting the award of the referees as a part of its decree, gave alimony to the wife "during her natural life." That the court has the power so to do, where it may be granted at all, seems to be very strongly implied by the terms of the statute which provide that the court may order so much of the husband's real estate, or the rents and profits thereof, as is necessary to be assigned and set out to the wife for life. Moreover where the language of the decree expressly states that it is to continue after the death of the husband, the authorities hold that it will so continue. *Miller* v. *Miller*, 64 Me. 489; Bishop Mar. and Div., § 601. In *Burr* v. *Burr*, 10 Paige, 20, in the Chancellor's Court, and afterward affirmed in the Court of Errors, 7 Hill, 207, it was held that alimony could be decreed to continue after the husband's death, during the entire life of the wife. And in *Carson* v. *Murray*, 3 Paige, 483, the husband and wife agreed to separate, and in the agreement was a provision for the payment of an annuity of $175, to the wife yearly, as alimony, during her life, and the court held that it did not cease at the death of the husband.

The Supreme Court of Iowa in *O'Hagan* v. *O'Hagan*,, 4 Iowa, 509, say: "In decreeing her sums of money in the first instance, or in making the proper and equitable order in relation to this property and her maintenance, the decree may provide for the payment thereof from year to year for a specific period, or may provide even that it shall continue during her life."

The authorities cited by the defendant's counsel do not support the position claimed by him. When examined, they will be found to relate to cases wherein the court did not in express terms provide for the payment of alimony during the life of the wife. Thus in the case of *Lennahan* v. *O'Keefe*, 107 Ill. 620, the court referring to *O'Hagan* v. *O'Hagan, supra*, hold that in the absence of language in the decree, showing an intention to bind the heir of the husband after his death, the allowance of alimony will terminate with the life of the husband.

In *Knapp* v. *Knapp*, 134 Mass. 353, there was no provision in the decree that the alimony should continue during the life of the wife; the decree was for alimony, with no words expressive of any intention for its continuance beyond the life of the husband.

[Minor point omitted.]

In accordance with the stipulation in the report of the case, the decision of the court is that the action is maintainable, not only for the installments due before, but subsequent to the death of William M. Stratton.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

MITCHELL v. MORSE.

(77 Me. 423.)

Will — devise — remainder — repugnancy.

A testator devised a residuum of real estate to his wife, continuing, "But on her decease the remainder thereof I give and devise to my children," etc. *Held*, that the wife took a fee, and the remainder was void.

ACTION to recover lands. The opinion states the case.

H. L. Whitcomb, for plaintiffs.

S. Clifford Belcher, for defendant.

WALTON, J. This is a real action, and the only question is whether John Mitchell, by his last will and testament, gave his

wife a fee-simple estate in the demanded premises, or only an estate for life.

It is the opinion of the court that he gave her a fee-simple estate. A devise of real estate without words of limitation vests in the devisee an estate in fee simple; and this result is not defeated by a devise over of the remainder. If a life estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee simple is given, the addition of a devise over of a remainder is void, because the whole estate having already been disposed of, there is nothing for it to act upon. The argument usually urged against this conclusion is that the devise over ought to be allowed to cut down or reduce the estate previously given to a life estate, upon the ground that such must have been the intention of the devisor. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder will not cut down the estate given to the first taker. *Jones* v. *Bacon*, 68 Me. 34; s. c., 28 Am. Rep. 1; *Stuart* v. *Walker*, 72 Me. 145; s. c., 39 Am. Rep. 311.

In this case the testator first gives a few small legacies to his children. He then gives the residue of his personal property to his wife. He then declares that if the personal property is not sufficient to pay the legacies and the expenses of his last sickness, enough of his real estate may be sold to supply the deficiency. He then adds this clause:

"I give and devise to my wife, Sarah F. T. Mitchell, all the rest and residue of my real estate. But on her decease, the remainder thereof I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them."

It will be noticed that in this devise there are no words of limitation. The gift is direct, positive and absolute. And but for the devise over of a remainder, no one would doubt that under our statute (R. S., chap. 74, § 16) the terms used are sufficient to convey an estate in fee simple. The devise over is also direct and simple. It has no qualifying words or conditions whatever annexed to it. We thus have, first, a devise of a fee-simple estate, and then a devise over of a remainder. The two cannot co-exist. It is settled law in this State, as will be seen by the cases cited, that the latter must yield. The question is *res judicata* in this State, and will not be further discussed here.

The plaintiffs are the children mentioned in the secondary devise. The defendant has a warranty deed from the primary devisee. His is the better title.

Judgment for defendant.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

BAXTER v. MOSES.

(77 Me. 465.)

Action — creditor's bill — execution, nulla bona — trust — statute of limitations.

It is essential to the maintenance of a creditor's bill to reach equitable interests, that it shall allege that execution has been returned unsatisfied on a judgment against the debtor.*

Directors of a corporation are not such trustees as are debarred from setting up the statute of limitations.

BILL to correct bonds and judgments. The opinion states the case.

R. P. Tapley, for plaintiff.

Frye, Cotton & White and *William L. Putnam*, for respondents.

PETERS, C. J. This is a creditor's bill to collect certain debts, principally judgments, which are due from the Androscoggin railroad company, and is before us on demurrer.

[Omitting minor points.]

The first objection urged by the respondents against the bill is, a want of jurisdiction in the court to act, because the bill contains no allegation that an execution was taken out upon any judgment and *nulla bona* returned thereon. This defense must prevail, and for the reason stated by SHEPLEY, J., in *Webster* v. *Clark*, 25 Me. 313, who says: "Courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate. It is only by the exhibition of such facts as show that these have been exhausted, that their jurisdiction attaches. Hence it is

* See *Quarl* v. *Abbett*, *ante*.

that when an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, the bill should state that judgment has been obtained, and that execution has been issued, and that it has been returned by an officer without satisfaction." Such has certainly become the settled rule in this State. It has been unhesitatingly affirmed in a series of cases. *Hartshorn* v. *Eames*, 31 Me. 93; *Dana* v. *Haskell*, 41 Me. 25; *Dockray* v. *Mason*, 48 Me. 178; *Corey* v. *Greene*, 51 Me. 115; *Griffin* v. *Nitcher*, 57 Me. 270; *Howe* v. *Whitney*, 66 Me. 17.

Our decisions do not stand alone upon the question. The decided preponderance of authority is the same way. Mr. Bump, in his work on Fraudulent Conveyances, at page 514, gleans the rule from all the cases of the country, and states it in these explicit terms: "The creditor's right to relief in such case depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction. The best and the only evidence of this is the actual return of an execution unsatisfied. The creditor must obtain judgment, issue an execution and procure a return of *nulla bona*, before he can file a bill in equity to obtain satisfaction out of the property of the debtor which cannot be reached at law." In Pom. Eq. Jur., § 1415, it is said: "The general rule is, that a judgment must be obtained, and certain steps taken toward enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment." In a note, the author explains: "Much of the conflict doubtless results from the effect judgments and writs of execution have in different States. The rule seems to be sustained by the weight of authority that before a creditor's suit can be brought to reach choses in action and personal property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made." The cases show, that in those States where a judgment is itself a lien upon land, an execution need not issue. In such case equity will proceed to make the lien effectual. Among the cases sustaining the rule as promulgated in our own State, are the following: *Tappan* v. *Evans*, 11 N. H. 311. *Smith* v. *Millett*, 12 R. I. 59; *Adee* v. *Bigler*, 81 N. Y. 349; *Adsit* v. *Butler*, 87 N. Y. 585. See also *Howell* v. *Lincks*, 87 N. Y. 637.

Suydam v. *Insurance Co.*, 51 Penn. St. 394; *Dormueil* v. *Ward*, 108 Ill. 216; *Brown* v. *Bank*, 31 Miss. 454; *Scott* v. *Ware*, 64 Ala. 174.

The rule has been sustained by the Federal Supreme Court in several cases, and in too strong terms to suppose that it can be considered as reversed by that court by the observations of Mr. Justice STRONG, in relation to it, in the case of *Case* v. *Beauregard*, 101 U. S. 688, a case cited for the complainant. See *Jones* v. *Green*, 1 Wall. 330; *Taylor* v. *Bowker*, 111 U. S. 110.

We think that outside of the authorities the rule is a reasonable one. It should not be in the power of a creditor to institute such an extraordinary remedy against his debtor, for no other reason than that his debt is overdue. A debtor may be able to relieve himself from threatening insolvency by the time an execution is obtained and demanded of him. His inability or unwillingness to pay should be established by some certain rule. What more reasonable one could be devised than that there shall be a judgment, an execution and a return of *nulla bona*? And to remove all uncertainty the official return is conclusive evidence that the creditor has exhausted all legal remedy without succeeding in collecting his debt. It is a beneficent rule for both parties.

No doubt, there may be exceptions to the rule requiring a return of *nulla bona*. Where the common-law means can not for exceptional causes be made to apply, there are cases which decide that equity may do what the law would do if it could apply. *Wiggin* v. *Heywood*, 118 Mass. 514; *Merchants' Bank* v. *Paine*, 13 R. I. 592. But we have no opinion to express upon any exceptional and hypothetical case at this time. Here there were judgments for many years existing, and no excuse is suggested or appears why further steps were not taken to enforce them.

Another question is whether the statute of limitations applies. This defense may be taken on demurrer where the bill on its face shows its application. *Mooers* v. *Railroad*, 58 Me. 279; Story Eq. Pl., §§ 484, 751.

Although the doctrine of equitable limitations lacks somewhat in definiteness, adapting itself, as it does, a good deal to circumstances, still it is well settled that upon legal titles and legal demands courts of equity adopt and apply statutes of limitations, acting upon them by analogy to the law. This rule applies to most questions in equity. It does not generally apply in cases of express trust. It may however apply in cases arising out of express trusts,

where the trust has been repudiated by the trustee, and he assumes a position of hostility to it. Besides applying the legal doctrine of limitations, equity has a favorite doctrine of its own which allows a defense to be based on a mere lapse of time and the staleness of a claim, denominated laches, if the delay has been of a passive character, and acquiescence under other circumstances. The defense of laches or acquiescence is independent of the statutory rules of limitation, and where no statute directly governs the case, may be founded on a delay, either longer or shorter than the statutory period. And so the defendants in the present case set up both the legal and the equitable defense. Story Eq. Jur., § 1520, *et seq.*

Before making an application of these principles to the case at bar, it is necessary to know just what facts are alleged. Opposite counsel widely differ as to the meaning of the bill. The bill seems to be in some respects uncertain and contradictory.

The complainants' counsel insists that the bill makes the officers of the company official and not individual defendants, and that it is really a proceeding against the corporation only. There could be such a bill, that is, one against the corporation only, making the officers of the corporation parties only for the purpose of obtaining from them a discovery. Such a practice, although anomalous and never much encouraged, grew up at an early period when a person interested in a cause was incompetent to testify. Story Eq. Jur., § 1501; Story Eq. Pl., § 235; 1 Dan. Ch. 179. But relief should not be prayed for in the bill, and if it is, demurrer lies. Not general demurrer however. The defendant should answer as to the discovery, and demur as to the relief. But after a general demurrer is overruled the defendant may demur *ore tenus* to the prayer for relief; as there is no other way of properly removing the inconsistency from the bill. *Many* v. *Beekman Iron Co.*, 9 Paige, 188; *Wright* v. *Dame*, 1 Met. 237. But we do not see how it is possible to avoid the conclusion that the officers are made personal parties to this bill. They are charged with malversation in the company's affairs, and the bill asks for special relief against them for money and property alleged to be in their hands.

If it were a bill against the company only, charging that the company now has assets in its hands, or what would be the same thing, assets held by agents for the company, it is evident enough that the statute would not be a bar. The complainant has debts and is entitled to collect them if the company has property. And a

lien established upon any property of the company attaches to the property, although in its agents' and servants' hands, if held by them for the company.

But it is altogether another and different thing to charge that the company did have funds or assets some ten to fifteen years ago, which at that time were wrongfully converted by its agents to their own use. A bill against the company for such acts of its officers would be valueless to creditors, unless the officers are made personally and individually parties thereto. A judgment against the company would not be a judgment against them. It is not an *in rem* judgment that is obtainable. And here again we are at a loss to know exactly what the bill means. It alleges fraud, but does not recite whether it was practiced by the officers upon the company or creditors. It alleges conversion, but does not intimate whether assented to by the company or not. The complainant does not narrate his grievance frankly. There is a hidden meaning.

If it is sought to reach funds which the officers of the company actually received from or for the company and converted to their own use in 1871, we think the complainants' claim against the officers is barred by the statute of limitations, and also by his laches; or if it is possible that the statute would not begin to run until a return of *nulla bona*, then by his laches in the long delay before obtaining a return of *nulla bona* and prosecuting this suit. The bill was commenced in 1881. All of the judgments produced were recovered as early as 1866, except one recovered in 1879, and that was merely the renewal of another judgment recovered in 1867, a fact upon our own records of which we can take judicial notice. Of course there may be causes or excuses preventing the operation of the statute. None are suggested or appear here.

There is no doubt that the property of a corporation is a trust fund pledged to the payment of its debts, and that directors hold the same under an implied or constructive trust for the benefit of creditors. It is not an express trust; not a purely equitable trust; not such a trust as exists between the directors and the company, (and even that relation is perhaps not a trust in a strict technical sense) it is a trust *sub modo* — in some respects analogous to a trust — something which the law for equitable purposes construes to be a trust. It is a charge on property rather than any right or interest in it. There is no contract obligation, no direct privity, between stockholders and the creditors of a company. See Perry

rusts (3d ed.), § 166. It is an equitable lien to aid in the enforcement of a legal right; to aid in collecting a debt. Story says (Eq. Jur., § 1252): "Perhaps to this same head of implied trusts upon presumed intention, although it might well be deemed to fall under the head of constructive trusts by operation of law, we may refer that class of cases, where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation." Mr. Thompson, a writer on the liability of directors of corporations, says: "The directors of a corporation are not trustees for its creditor in the same sense in which an agent is the trustee of his principal. In this sense they are the trustees of the shareholders who have elected them to act as such, and not trustees of strangers to the shareholders." 6 South. Law Rev. (N. S.) 403. In *Poole's* case, 9 Ch. Div. 322, JESSEL, M. R., says the same thing. In Pom. Eq. Jur., § 1047, the directors' liability to creditors of the company is classified with constructive trusts, although the author doubts the propriety of calling it as much of a trust as even that. Pom. Eq. Jur., § 1044, *et seq.*

Constructive trusts and all trusts, save purely equitable or express trusts, are in equity subject to the statute of limitations. Wood Limitations, § 58, and cases in note. It is there said: "With respect to the operation of the statute of limitations upon cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered." Again the author (§ 215) expresses the same proposition in these other words: "One who is not actually a trustee, but upon whom that character is forced by a court of equity, only for the purpose of a remedy, may avail himself of the statute." The doctrine could not be more satisfactorily stated. The authorities support this principle with great unanimity. A few only need be cited, those more especially of the class of constructive trust cases to which the present case belongs. *Baker* v. *Bank*, 9 Met. 182; *Peabody* v. *Flint*, 6 Allen, 52; *Farnam* v. *Brooks*, 9 Pick. 212; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Stringer's* case, 4 Ch. App. 475; *In re Alexandra Palace Co.*, 21 Ch. Div. 149; *Carrol* v. *Green*, 92 U. S. 509.

It is not inferable from the bill that the acts of the directors in 1871 were of a character such as to constitute a breach of trust existing between them and the company, which would not be barred by the statute. But if it were so, it is not perceived that it would make the creditors' claim better. The acts might be without the statute as to the company, and within it as to creditors. The right of the one is distinct from the right of the other, and independent of it. Directors may be liable to creditors without any liability to the company or its stockholders. We do not see how the creditors' claim is enlarged or lessened by any claim of the company against the stockholders. They are not the same. Shel. Subrogation and cases. *Smith* v. *Hurd*, 12 Met. 371; *Hersey* v. *Veazie*, 24 Me. 9; *Smith* v. *Poor*, 40 Me. 415. It may be otherwise, under the English statutes providing for winding up the business of public companies, under which the liquidator represents shareholders and creditors alike. *In re National Funds Assurance Co.*, 10 Ch. Div. 118; *Flitcroft's* case, 21 Ch. Div. 519. But under our practice the remedy is nothing more than an assistant and collateral proceeding in equity employed by a creditor to collect a legal debt.

Although there is serious question as to the meaning of the bill so far as bearing upon the question of laches or limitation, there can be no doubt upon the first point discussed by us, and therefore the conclusion must be,

Demurrer sustained.

WALTON, LIBBEY, EMERY, FOSTER and HASKELL, JJ., concurred.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

LEWIS v. FLINT AND PERE MARQUETTE RAILROAD COMPANY.

(54 Mich. 55.)

Negligence—proximate cause.

A railway passenger was carried a little past the station of his destination on a dark night, and on leaving the train was misinformed by the conductor as to where he was, but being acquainted with the neighborhood he soon discovered the mistake. If he had got off where he was told he had, it was his intention to follow the track, and cross a culvert, although he might have avoided it, but he pursued his way intending to cross another culvert. He fell into this and was hurt. *Held*, that the company's negligence was not the proximate cause of the injury.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Blodget & Patchin and *C. I. Walker*, for appellant.

W. L. Webber and *O. F. Wisner*, for appellee.

COOLEY, C. J. Action to recover damages for a personal injury The facts as they appeared on the trial were as follows:

* See notes, 50 Am. Rep. 81, 596, 603.

The plaintiff resides in the township of Huron, a few miles east of Belden station on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold and wet. The train stopped when "Belden" was called, and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station-house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car lengths, and he replied that if that was all it was no matter as he had to go that way. An east and west highway crosses the railroad about twenty-four rods south of the station-house, which the plaintiff would take in going to his home. If he was two car lengths beyond the station-house, he would still be north of the highway; and supposing that to be the case, he followed the tract along south in preference to going back to the station-house from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him as to where he was when he alighted from the train was erroneous. He turned about to retrace his steps, and following the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near to the track on his right, and the smoke from these affected his eyes, but he saw a switch light which he knew was near the crossing, but which at the time was too dim to aid him. He continued to approach the cattle-guard carefully, intending if there was a timber or plank over it to cross upon that; and if not, then to pass down into it and climb out. In the dim light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he attempted to save himself by springing upon the other the other foot caught, and he was precipitated into the cattle-guard, and received an in-

jury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows — not being able to use his lower limbs — and with great difficulty he reached a neighboring tavern, where he was cared for.

On the trial a claim was made on the part of the defense that the plaintiff was negligent in following the railroad track back to the cattle-guard and in attempting to cross it, when he might have left the track to the right and passed along the field until he came to the highway; and evidence was given to show that he would have encountered no impediments. But in such a night as this was, it is not clear that the field would have afforded a safer passage than the highway; and his failure to take it would at most only raise a question of negligence on his part which would necessarily go to the jury. *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 118; *Billings* v. *Breinig*, 45 Mich. 72; *Chicago, etc., R. Co.* v. *Miller*, 46 Mich. 537; *Marcott* v. *Marquette, etc., R. Co.*, 47 Mich. 7. In this case the court took the case from the jury, and directed a verdict for the defendant.

This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action.

The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed is liable for the damages, though the property for which compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. *Kellogg* v. *C. & N. W. R. Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69; *Fent* v. *Toledo, etc., R. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13; *Wiley* v. *West Jersey R. Co.*, 44 N. J. Law, 248; *Milwaukee, etc., R. Co.* v. *Kellogg*, 94 U. S. 469. But these cases, we think, are not analagous to the one before us. The negligent fire was the direct and sole cause of the injury in each instance, and there was no intervening cause whatever. The cases are in harmony with

Hoyt v. *Jeffers*, 30 Mich. 181. The case of *Pennsylvania Co.* v. *Hoagland*, 78 Ind. 203, seems at first view to be more in point. The action in that case was brought by a woman, who in consequence of misinformation on the part of the person in charge of a railroad train, left the car in the night-time at the wrong stopping place, and wandered about for an hour or more before she could find shelter, taking cold from exposure. But here, as in the other cases cited, there was no cause intervening the wrong complained of and the resulting injury, and the question of proximate cause does not appear to have been raised in the case. *Smith* v. *Steam Packet Co.*, 86 N. Y. 408, is also relied upon, but it is unlike this in the important particular that the intervening cause, which after the first wrong on the part of the defendant operated to bring injury to the plaintiff, was a neglect of proper care which the court held was due from the defendant to the plaintiff under the circumstances, so that all the injury received was a proximate result of the defendant's neglect of duty.

The case of *Brown* v. *Chicago, Mil. & St. Paul Ry. Co.*, 54 Wis. 342; s. c., 41 Am. Rep. 41, more nearly resembles the present case than any other to which our attention has been called by counsel for the plaintiff. The facts, as stated in the prevailing opinion, are the following: The plaintiffs with their child, seven years old, were being carried on defendant's cars, with Mauston for their destination, and when they arrived at a station three miles east of Mauston they left the train, under the direction of the brakeman, who told them they were at Mauston. It was in the night; it was cloudy and wet; there was a freight train standing on a side track, where they were put off the train; there was no platform and no lights visible, except on the freight train. Plaintiffs soon ascertained they were not at Mauston, but did not know where they were. They did not see the station-house though there was one, hidden from their view by the freight train. They supposed they were at a place two miles east, where the train sometimes stopped but where there was no station-house. They started west on the track toward Mauton, expecting to find a house where they might stop, but did not find one until they came to a bridge within a mile of Mauston, and then they thought it easier to go on to that place than to seek shelter at the house, which was a considerable distance from the track. Mrs. Brown was pregnant at the time, and when she arrived at Mauston was quite exhausted. She had, during the night, severe

pains, which continued from time to time, and were followed by flowing, and at length by a miscarriage, inflammation and serious illness. The plaintiffs claimed that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston, and the question in the case was whether the defendant was liable for the injury to Mrs. Brown, admitting it to have been caused by her walk. The majority of the court, finding that "there was no intervening independent cause of the injury other than the act of the defendant," and that "all the acts done by the plaintiffs and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant," held that "the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury," quoting Lord ELLENBOROUGH in *Jones* v. *Boyce*, 1 Stark. 493, that "if I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of *Pullman Palace Car Co.* v. *Barker*, 4 Col. 344; s. c., 34 Am. Rep. 89, is opposed to the case in Wisconsin, as are also *Hobbs* v. *London & S. W. R. Co.*, L. R., 10 Q. B. 111, and *Francis* v. *St. Louis Transfer Co.*, 5 Mo. App. 7. But it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before us there was an independent cause intervening the fault of the defendant and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence.

To show what is understood by intervening cause, it may be useful to refer to a few cases. *Livie* v. *Janson*, 12 East, 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded and wrecked on Governor's island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is *Delano* v. *Ins. Co.*, 10 Mass. 354, where a like result was reached.

In *Tisdale* v. *Norton*, 8 Met. 388, the facts were that a highway was defective, and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in

repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town, and the proximate cause in this case was outside the highway, not within it.

In *Anthony* v. *Slaid*, 11 Met. 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense for care and support; but the action was held not maintainable.

In *Silver* v. *Frazier*, 3 Allen, 382, it was decided that a principal, whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said BIGELOW, C. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that his agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff."

In *Dubuque Wood & Coal Ass'n* v. *Dubuque*, 30 Iowa, 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood, but it was held he could not recover. BECK, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the

river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second, is denied."

Similar to this are *Daniels* v. *Ballantine*, 23 Ohio St. 532; s. c., 13 Am. Rep. 264; and *McClary* v. *Sioux City, etc., R. Co.*, 3 Neb. 44; s. c., 19 Am. Rep. 631. In each of these cases the negligence of the defendant left the property of the plaintiff where, by an act of God — in one case a flood, and in the other a tornado — it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of injury.

In *Scheffer* v. *Railroad Co.*, 105 U. S. 249, it appeared that by a collision of railroad trains a passenger was injured, and becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. MILLER, J., speaking for the court, and referring to *Insurance Co.* v. *Tweed*. 7 Wall. 44, and *Milwaukee, etc., R. Co.* v. *Kellogg*, 94 U. S. 469, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad."

In *Bosch* v. *Burlington, etc., R. Co.*, 44 Iowa, 402; s. c., 24 Am. Rep. 754, the plaintiff's house took fire, and the fire department, because as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case, *Metallic Compression Co.* v. *Railroad Co.*, 109 Mass. 277; s. c., 12 Am. Rep. 689, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of the defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to extinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was also in *Billman* v. *Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230; *Lane* v. *Atlantic Works*, 111 Mass. 136, and *Ricker* v. *Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 269 — all of which are ruled by the *Squib* case (*Scott* v. *Shepherd*, 2 W. Bl. 892); and so perhaps are *Fairbanks* v. *Kerr*, 70 Penn. St. 90; s. c., 10 Am. Rep. 664; and *Lake* v. *Milliken*, 62 Me. 240; s. c., 16 Am. Rep. 456.

In *Henry* v. *St. Louis, etc., R. Co.*, 76 Mo. 288; s. c., 43 Am. Rep. 762, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and while upon the ground, stepped upon a track, where he was run upon and injured by a train. HOUGH, J., speaking for the court said: "It is perhaps probable that if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not therefore be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of the defendant to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or being able to get in, chose to remain outside."

Further reference to authorities is needless. The application of the rule that the proximate, not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right,

from the information received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained, the plaintiff discovered where he was and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature, for on the supposition that he was north of the highway when he left the train he had voluntarily started south with the expectation of crossing the cattle-guard on that side, over which he might or might not find a plank laid, when by stepping back a few rods, where he supposed the station-house to be, he might pass from thence out to the highway by the passage-way for persons and vehicles leading from the station-house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger. Neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain first whether a plank or timber was laid across, and if so, to cross upon it, and if not to step down into the excavation and out on the other side. Where was he to look for danger? The night was dark, it is true; but even by the sense of feeling when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine his exact location. But then something happened which it is evident that the plaintiff with full knowledge of all the facts did not at all expect and had not feared. Misled apparently by visual deception he moved forward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and this deception, with the slipping of his foot, concurred to produce the injury.

What was this but pure accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip; and such a wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place the fault of the defendant and its relation to

the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God, in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of danger and the injury; the act of the defendant was the last of a long sequence; but as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. *Weaver* v. *Ward*, Hob. 134; *Gibbons* v. *Pepper*, 1 Ld. Raym. 38; *Losee* v. *Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623; *Vincent* v. *Stinehour*, 7 Vt. 62; s. c., 29 Am. Dec. 145; *Morris* v. *Platt*, 32 Conn. 75; *Brown* v. *Collins*, 53 N. H. 442; s. c., 16 Am. Rep. 372; *Bizzell* v. *Booker*, 16 Ark. 308; *Marshall* v. *Welwood*, 38 N. J. Law, 339; s. c., 20 Am. Rep. 394; *Paxton* v. *Boyer*, 67 Ill. 132; s. c., 16 Am. Rep. 615; *American Express Co.* v. *Smith*, 33 Ohio St. 511; s. c., 31 Am. Rep. 561; *Plummer* v. *State*, 4 Tex. App. 310; s. c., 30 Am. Rep. 165; *Parrott* v. *Wells*, 15 Wall. 524; *Holmes* v. *Mather*, L. R., 10 Exch. 261. A case like this appeals strongly to the sympathies. But sympathy cannot rule the decision.

Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him, and the Circuit Court was correct in so holding. The question what judgment shall be rendered in the case is for the present reserved.

The other justices concurred.

BROWN v. COUNTY TREASURER.

(54 Mich. 132.)

Mandamus — to exhibit records.

Mandamus lies to compel a custodian of excise bonds to allow a citizen interested in inspecting them to have access to them.

MANDAMUS. The opinion states the case.

Henry A. Chaney, for relator.

Densmore J. Cramer, for respondent.

SHERWOOD, J. The papers presented in this case show a most extraordinary proceeding on the part of the county treasurer. A member of the board of review of Ann Arbor — who had been for the two previous years a supervisor in Washtenaw county — on application to that officer for permission to inspect a liquor bond, is denied the privilege on the ground that the treasurer regards it as unnecessary for the purpose stated by the petitioner. It is not pretended that such purpose is an unlawful one, or that the request was not respectfully made.

The county treasurer holds a public office, and the statute requires the liquor bonds to be filed therein and to be kept by the treasurer. They thereby become public records, and as such may be examined and copies taken thereof, if desired by any citizen. How. Stat., § 9347. There are many and very good reasons why citizens may and should have this right. 1st, as a citizen, to hold the board, whose duty it is to approve the bond, to public accountability for accepting insufficient bonds; 2d, to prosecute sureties criminally when they have falsely sworn to responsibility; 3d, to see if there is any sufficient security for any citizen, widow, child or parent who may have a right of action for violations of the license law (which frequently occur) against the liquor seller and his sureties, and to see that they are not forged; 4th, as assessor or other tax officer, who may desire to compel parties who may have property, according to their oaths given on justification, to pay their share of the taxes, and for many other purposes which readily occur to any one who has given any attention to the subject.

It is no answer to say that the time has gone by for performing the official act by the person desiring the information sought, or that the purpose intended in the judgment of the respondent is not a commendable or proper one, so long as it is not criminal, when the inspection is desired. The law does not vest in the treasurer any such discretiony power to deprive the citizen of a substantial right given by the statute — one in which he may have large pecuniary interests, and of which he may be deprived if the action of the treasurer in this case can be sustained, and the most beneficial object of the act under which the bond is given defeated.

City boards and other officers, whose duty it is to approve of these bonds, are held to a great extent to responsibility in taking proper security in this class of cases by a just public opinion, from which they cannot be permitted to shield themselves in the course pursued by this respondent. The real purpose of the statute is that perfectly safe bonds shall be taken for the protection of all parties, and this purpose must not be defeated by proceedings of the sort complained of in this case.

We are all of the opinion that the action taken by the treasurer in this case can find no support in law or right, and should not be sustained. If authority were needed upon the construction of the statute as we have given it, it will be found in *Ferry* v. *Williams*, 41 N. J. L. 332; s. c., 32 Am. Rep. 219, which we fully approve. The request of the petitioner was a reasonable one, and it was the duty of the officer to comply with it when made.

The writ of mandamus must be granted as prayed, with costs against the respondent.

The other justices concurred.

NEELY v. ROOD.

(54 Mich. 134.)

Trust—following misapplied fund.

N. put $469 into the hands of W. in trust. W. deposited it in bank with other moneys to his own credit, and afterward drew out and applied to his own use all but $91. Subsequently he drew checks for that balance, and some $1,400 in another bank, in favor of R., to secure him against his liability for W., on an official bond. *Held*, that N. could not recover his money from R.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

F. O. Clark, for appellant.

E. E Osborn, for appellee.

CHAMPLIN, J. Plaintiff brought assumpsit, his declaration containing only the common counts. It appears that on the 31st day of December, 1881, plaintiff gave to one John E. Ward his check on the First National Bank of Marquette, Mich., for $469, payable to the order of John E. Ward, county treasurer, for the purpose of having Ward pay to the auditor-general, at Lansing, certain back taxes upon lands owned by plaintiff, amounting to $468.38. John E. Ward at this time was county treasurer of Marquette county, but the check was not received by him in his official capacity nor was it any part of his official duty to pay such taxes. He kept a bank account at the First National Bank of Marquette, and also at the Lansing National Bank of Lansing. So far as appears, his undertaking to pay these taxes for Neely was wholly gratuitous. He had been in the habit of accommodating parties in this way, and kept a deposit in the Lansing National Bank for this purpose. When any one paid him money to pay back taxes he did not forward it to Lansing, but deposited it at Marquette, and would draw checks in favor of the auditor general on the Lansing National Bank. The funds deposited in this bank were made in this way: whenever he received in the course of his business any exchange on Chicago, New York or Detroit, he sent it to this bank at Lansing, and thus saved exchange between Marquette and Lansing. When he received the check from Neely he deposited it to his own credit in his account with the First National

of Marquette, and afterward drew it out and applied the money to his own use. He never paid the taxes to the auditor-general. About a week prior to January 24, 1882, Ward discovered that he was a defaulter in his office of county treasurer. In this emergency he went to Mr. Wadsworth, one of his sureties on his official bond, to whom he made known his financial condition, and proposed to secure his sureties by transferring to them all his property. During the interview he informed Wadsworth that he had a balance in the bank at Lansing of about fifteen hundred dollars, and that parties had left with him about a thousand dollars for him to pay back taxes with, but did not mention Neely's name as being one of the number. This was on the 23d of January. On the 24th, the defendant Rood, who was also one of his sureties, came to him with a request signed by all the sureties on his official bond, requesting him to make the transfer of his property to defendant Rood, for the purpose of protecting them against loss on account of his defalcation, which he proceeded to do without delay. At that time there was standing to his credit in the bank at Marquette about $91, and in the bank at Lansing $1,423.44. He had made no remittances to the bank at Lansing after receiving the check from Neely, but had checked out some in the mean time. He drew checks in favor of Rood for the balances in both banks, but did not tell him that any of the money in the bank at Lansing was subject to the payment of any back taxes of Neely or other persons, and the jury found as a fact that Ward did not hold $469 on deposit in the Lansing bank for the purpose of paying Neely's back taxes, as the money given to him for that purpose by Neely.

Under these facts plaintiff claims that Ward held this $468.38 only in trust, and that he could not transfer title to it to Rood, but that he received it as the money of the plaintiff, and Rood is liable to him for money had and received, and that this action is brought upon that theory, and also upon the theory that it is immaterial whether it was the identical money given to Ward by plaintiff; that he could not transfer any money to Rood until the money be held in trust for others was provided for and set off. The infirmity of this position is, that it assumes that Rood received the $468.38 which Neely placed in Ward's hands to pay his back taxes. The rule contended for is well settled, that where property held upon any trust to keep, to use or invest in a particular way, is misapplied by the trustee and converted into different property, or is sold and

the proceeds are thus invested, the property can be followed wherever it can be traced through its transformations, and will be subject when found, in its new form, to the rights of the original owner or *cestui que trust.* *Cook* v. *Tullis*, 18 Wall. 341.

But it is essential to the assertion of a beneficial title in a trust fund that it can be clearly traced into the hands of the party to be charged, though no more than proof of substantial identity is required. In this case the record shows that the money received by Ward on Neely's check was deposited by him in his general account in the First National Bank of Marquette. It was not placed there as a special deposit, and its identity was lost. It became the bank's money, and the bank became debtor to Ward for the amount. No subsequent appropriation of any of his money was ever made by Ward to pay Neely's taxes, and we are not called upon by this record to decide what effect such appropriation would have had if it had been made, and notice thereof brought to the knowledge of Rood. If when assigning to Rood, the recent bankrupt law of the United States had been in force, which saved all trust property from passing to the assignee, Ward had been declared a bankrupt under that law, the money which he received of Neely and deposited in the bank would have vested in the assignee, and Neely could not have recovered it as a trust fund. Thus, *In re Janeway*, 4 Nat. Bank Reg. 100, money was left with Janeway by Mary Ann and Margarette Cool to be invested for them. Instead of making the investment, he employed it with his other means in speculations. It was not claimed that it could be identified, and the court applied the rule as laid down in Hill on Trustees, that "where the trust property does not remain in specie, but has been made way with by the trustee, the *cestui que trusts* have no longer any specific remedy against any part of his estate in his bankruptcy or insolvency, but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them." So in *Hosie's* case, 7 Nat. Bank Reg. 601, Judge LONGYEAR held, that when money was sent to Hosie, who was a banker, for the express purpose of paying a certain note and mortgage, who entered it on his books to the credit of the person who sent it, and before the note and mortgage arrived at the bank to be paid, Hosie went voluntarily into bankruptcy, the party was not entitled to have the money so deposited repaid by the assignee, because it had become impossible to do so, the money having become part of the general assets of the bankrupt,

and that he must take his chances with the general creditors. And in *Bank of Commerce* v. *Russell*, 2 Dill. 215, which was a case where a bank sent notes to a banker for collection, which he collected and placed with his other funds, the court held that the identical money not having been kept separate and distinct from the banker's other money, it could not be recovered from the assignee as a trust fund. Had Ward not failed or made an assignment, and had refused to pay the taxes, Neely could not have maintained an action against the First National Bank of Marquette for money had and received, based upon this theory that the money deposited by Ward constituted a trust fund. Much less could he have maintained such action against the Lansing National Bank. And if he could not in their hands, it is manifest that he could not follow it through their hands into those of Rood, and recover it in an action for money had and received.

An examination of cases at law where money has passed from the hands of the bailee or trustee to whom it was intrusted, to a third person, will show that the reason for allowing a recovery in an action for money had and received is based upon the fact that such person had received the plaintiff's money under circumstances which showed that he had no right to retain it as against the plaintiff. Thus in *Rusk* v. *Newell*, 25 Ill. 226, cited on plaintiff's brief, Rusk sent money by Newell, to be by him delivered to plaintiff's agent to be applied to a specified purpose. Newell delivered the money to the agent and took his receipt. He then received from the agent the same money back in payment of a debt due him from the agent. Here the identical money came to the hands of the defendant. He knew it was the plaintiff's money when he received it, and knew it was being misapplied when he received it from the agent to pay the agent's debt due to him. Another case cited on plaintiff's brief will suffice by way of illustration to show the principle upon which the action can be maintained; thus in *Mason* v. *Waite*, 17 Mass. 558, plaintiff had sent a package of money by one Sargent, a stage driver, to be delivered in Boston. Defendant kept a gaming-house, and won the money from Sargent at a game of faro. Mr. Justice PARKER said the identical money of plaintiff's came to defendant's hands unlawfully, and that plaintiff could recover it from defendant in an action for money had and received.

In this case Ward received the money from the bank on Neely's check, and the same was placed by the bank to Ward's credit. He

then drew checks on his account in the bank from time to time, until there remained due him from the bank about $91, and this indebtedness from the bank he transferred to Rood. The result of the whole proof is that plaintiff has wholly failed to trace Neely's money, or the avails of his money, or of the fund created by it, into the hands of Rood.

As the facts upon which the plaintiff's theory is based are not supported by the testimony in the case, it follows that the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

The other justices concurred.

RUBENSTEIN v. CRUIKSHANKS.

(54 Mich. 199.)

Innkeeper — liability for guest's goods.

An innkeeper is bound for the safe-keeping of the valise and box of a peddler, his guest, although he was not notified of the nature and value of their contents, and the peddler was too drunk to take proper care of them.

ACTION for loss of goods. The opinion states the case. The plaintiff had judgment below.

Ball & Hanscom, for appellant.

SHERWOOD, J. The defendant was proprietor of a hotel at Crystal Falls, in the county of Marquette. On the 15th day of July, 1883, the plaintiff, who was a stranger in the place and engaged in peddling, accompanied by an employee, became a guest of the defendant's, and remained at his hotel until the following Monday forenoon. On entering the hotel the defendant took charge of his baggage and goods and assigned plaintiff a room for the night, which he and his employee occupied. They each had a valise and small box which contained their baggage and goods to the amount of over $300. On Monday the plaintiff's valise and goods, while they were thus in the hotel, were stolen, and the plaintiff brought this suit against the defendant as innkeeper to recover the value of the property lost, and obtained a judgment therefor.

On the trial the plaintiff's testimony was to the effect that the plaintiff, at the time the goods were stolen, was stopping at the hotel as a guest; that his valise and goods were deposited in the usual place in the bar-room where baggage and the goods of guests were kept in the care of the defendaut; and while there in his care the goods were taken. On the contrary of this, the defendant testified that on Monday morning he placed the goods and valise of the plaintiff, which were lost, on a table in the care of the plaintiff.

The testimony in the case was brief, and no exceptions were taken upon the trial other than those to the charge and the refusals to charge.

That the plaintiff was the guest of the defendant, and remained at his hotel the length of time claimed does not seem to have been contested. The question as to who had the custody of the goods at the time they were stolen was submitted to the jury, who were told by the court, that if the plaintiff had charge of them, he could not recover, and their general verdict determined that question in the plaintiff's favor.

It appeared from the testimony that while the plaintiff was at the hotel he drank liquor freely at the bar, and became somewhat intoxicated, and counsel for the defendant requested the court to charge the jury that they could take that fact in consideration in determining the negligence of the plaintiff at the time the goods were lost, and the court charged this would make no difference if the goods had been placed in charge of the defendant, and the fact that the plaintiff got intoxicated at the bar of the landlord should, if any thing, cause him to be held to a stricter liability. We see no error in this charge.

It was further claimed by defendant's counsel that is was the duty of the plaintiff in this case to notify the defendant of the valuable character of the goods contained in the valise and box when he became defendant's guest. We do not think the record discloses a case making such notification necessary, although the rule, in a proper case for its application, we recognize. We think the charge of the court upon this subject was correct.

At the close of the evidence counsel for the defendant presented eight special requests to the court to charge. We have examined them all carefully, and are satisfied that the charge of the court covers all the questions of law therein raised sufficiently necessary

to enable the jury to properly dispose of the facts in the case. The charge given is as follows:

"*Gentlemen of the jury:* The plaintiff claims that he went to the hotel of the defendant on a certain day and took with him as baggage a pack and valise containing goods, he being a peddler; that he went there as a guest of the defendant; that his goods were some of them lost while he was there as his guest, and therefore the defendant is liable to pay for them.

"The liability of an innkeeper, gentlemen, is this: Whenever a guest goes to an inn or hotel and becomes a guest of the hotel, and leaves his property with the hotel-keeper, the hotel-keeper is responsible for the baggage or goods so deposited. It is not necessary that any thing should be said between the guest and the landlord as to the liability. It is not necessary that the guest should say to him, 'You take these goods of mine and keep them.' If he goes into the office of the hotel and deposits his goods there — his valise, or whatever he has accompanying him as a guest, and deposits it there in the presence of the landlord, in the office, in the customary place where things were ordinarily deposited, so that the landlord sees it, and there receives him as his guest, the landlord's liability is then fixed for these goods, and it is then his duty to take care of them. If he seeks to escape liability in case they are lost then the burden of proof is upon him. Mere proof that the goods are lost—mere proof even that they are stolen, without showing by whom — would not release the innkeeper from liability. Although they were stolen from his office, from the place where the guest had left them, without any negligence on the part of the guest, the innkeeper in that case would be liable. In other words, the burden of proof is entirely upon him. So, gentlemen, if you find in this case that the plaintiff went to the hotel of the defendant, it being admitted that he was an innkeeper; that he went there as his guest; that he deposited the goods which he had with him with the landlord, the defendant in the case, or in his presence, in the office of the hotel, in the customary place where such things were deposited, and the goods were lost, I charge you that the defendant would be liable for the goods so lost unless there was some contributory negligence, or some other agreement on the part of the plaintiff.

"Now then if the plaintiff and the defendant made an arrangement by which the plaintiff, Mr. Rubenstein, was to take care of

his own goods, that then would release the defendant in the case. If he gave the landlord to understand by his acts or by his words that he would take care of his own goods and relieve the landlord, the defendant in the case, from liability on that account, why of course he could not recover, because he would then be guilty of contributory negligence, and would have assumed to take care of his own goods. That, gentlemen, is about all there is of this case, so far as the liability is concerned. If he was received there as a guest, and the defendant, under the instructions I have given you, assumed control of his goods and of him, then he is liable, unless under the charge I have given you, you find that the plaintiff in the case made some other agreement, or an agreement to take care of his own goods, or gave the defendant in the case to understand that he would take care of his own goods. If he did not do that then the defendant is liable. The defendant in the case claims that there were valuable goods in the plaintiff's valise, and therefore he should have notified the defendant of that fact. It is true, gentlemen, that under certain circumstances a person may have such valuable goods in his possession that he should notify the landlord to take care of them; notify him what they were. But this would not apply to a case where a peddler went to a hotel with his pack and his valise which he used in travelling, provided he had with him the ordinary things that such a man carries for the purpose of carrying on his trade. If the plaintiff in this case had such things as are usual and customary for a man in his position to have in carrying on his trade, then the defendant assumed all the liability for what he had in there without further notice.

As to the question of damages, gentlemen, if you reach that point, it is a matter entirely and exclusively for you. You must examine the plaintiff's testimony carefully in regard to what he had there and its value. It is his duty of course to give you proof from which you can say that he has lost goods of a certain value. If he has done that, and you find that the defendant is liable, then you must give judgment for whatever you find he has proven to your satisfaction, by a preponderance of evidence, that he lost, with interest from the date of its loss to the present time."

Mr. Ball. "Your honor spoke about the principle of the duty of the plaintiff to notify the hotel-keeper of his valuable goods, if he had the ordinary material. You say that would not apply in

case he had the ordinary things that peddlers have. I think it would be proper to call the attention of the jury to the evidence upon that point. The evidence is that there was no pack; not any thing but a valise such as travellers ordinarily carry. The hotel-keeper had no way of knowing that they were peddlers, nor is there any evidence showing that he had any reason to suppose that they were peddlers, unless it was from their race. The evidence is that they had these valises, and they had two large paper boxes, such as they ordinarily carried their goods in."

The Court. "Of course we know, as a matter of fact, that there are peddlers going around the country; whether or not they all carry packs — I referred to that because I supposed they did — and the valise usually with them. You understand, gentlemen, I have charged you, if they were carrying such things as peddlers usually carry, there was no obligation on the part of the plaintiff to notify the defendant of what he had in it; but in case the things were of extraordinary value — as for instance, if a man had a tray of diamonds worth thousands of dollars in his valise — and he should say nothing about it, but leave it in the way in which the goods were left here, then he might be found guilty of contributory negligence, and it might be his duty to notify the landlord so as to put him upon his guard, that he might take extraordinary precaution to protect property of very great value. But if it was the ordinary goods that he used in his business, then he would not be bound so to do."

Counsel for the defendant then requested the court to charge the jury in addition to previous requests: "That the jury can take into consideration, on the question of negligence of the plaintiff, the fact of his drinking and being intoxicated at the time the goods were lost." Which last request was refused by said court.

The court then further charged said jury as follows: "I don't think that would make any difference. In fact when the goods were once placed in his charge, the fact that the owner of the goods got intoxicated there at the bar of the landlord, if any thing, I think the landlord should be held to stricter liability on that account. If he gave the landlord to understand that he would take care of his own goods, of course he cannot recover; but if he did not do so, then the landlord must be liable."

This charge is clear, full and states the law correctly, applicable to the facts in the case.

We find no error in the record, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

The other justices concurred.

Myers v. Kalamazoo Buggy Company.

(54 Mich. 215.)

Trade-mark — infringement — sale of good-will.

Three parties had carried on business at Kalamazoo under the name of Kalamazoo Wagon Company. Two of them sold out their entire interest, including the good-will, to the plaintiff, and afterward set up a like business, almost next door, under the name of Kalamazoo Buggy Company, issuing circulars and cards in that name, resembling those of the plaintiff. *Held*, that such use of that name should be restrained, but that the defendants should not be prohibited from receiving mail matter addressed in their said name.*

INJUNCTION. The opinion states the case. The injunction was granted below.

Edwin M. Irish and *Henry F. Severens*, for complainant.

Dallas Bondeman and *Wm. B. Williams*, for defendants.

Cooley, C. J. The bill of complaint in this cause alleges in substance that on April 25, 1881, complainant and Ira V. Hicks, Michael Kennedy and Moses H. Lane formed a copartnership at Kalamazoo under the firm name of the Kalamazoo Wagon Company; that under that name they worked up a large business in the sale of wagons, buggies and cutters throughout the United States; that on April 4, 1883, said firm consisted of complainant, said Hicks and Lane and Ida E. Lane, the said Michael Kennedy having sold out his interest in said firm; that up to the last-mentioned date said firm had manufactured nearly four thousand wagons, buggies and cutters; that said firm had issued circulars to the trade throughout the United States, containing cuts and description of goods, and had become widely known throughout the country under the name of the Kalamazoo Wagon Company, and that the good-

* See *Shaver* v. *Shaver* (54 Iowa, 208), 37 Am. Rep. 194.

will of said firm was valuable; that on April 5, 1883, said Moses H. Lane and Ida E. Lane executed and delivered to complainant an agreement, by which for $15,000 they sold, assigned, transferred and conveyed all of their interest in the property, money, assets and good-will, and all other property of every name and nature in and to the firm of the Kalamazoo Wagon Company, and gave to complainant a quit-claim deed to all the real estate of said firm, and that on May 16, 1883, complainant purchased the interest of Ira V. Hicks in said concern, and thereby became the sole owner of the property and assets of said concern, and has since continued said business alone, under the firm name of the Kalamazoo Wagon Company; that on May 24, 1883, said defendants, Moses H. Lane, George T. Lay, Frank B. Lay and Ida E. Lane, organized a corporation under the name of the Kalamazoo Buggy Company, under the general act authorizing such incorporation, for the purpose of manufacturing buggies and cutters; that said corporation has erected buildings at the corner of the Michigan Central and Grand Rapids and Indiana railroads, within a few feet of the buildings owned by the Kalamazoo Wagon Company, and is there engaged in manufacturing and selling the same class of goods as has been manufactured by the Kalamazoo Wagon Company from its commencement, and said Kalamazoo Buggy Company has issued circulars to the trade with descriptive cuts of the goods manufactured by it of the same general size and appearance, and containing the same cuts and general description as the circulars of the Kalamazoo Wagon Company, and has advertised their building as situated on the said railroad crossing; that since its organization a large part of the business of the Kalamazoo Wagon Company has been transacted through the mails, and before the formation of the Kalamazoo Buggy Company much of the mail of the Kalamazoo Wagon Company would come addressed to the Kalamazoo Buggy Company — people confounding the words of similar meaning — and that since the formation of the Kalamazoo Buggy Company, great confusion has arisen in the mails by reason of the similarity of names, and mail intended for complainant was constantly addressed and delivered to the Kalamazoo Buggy Company; that by locating near the Kalamazoo Wagon Company's building, and using the name Kalamazoo Buggy Company, and issuing such a circular as it has issued, the Kalamazoo Buggy Company are misleading the public and customers of complainant into the belief that the buggy com-

pany is the same concern as the wagon company, and that thereby the complainant is deprived of the good-will purchased of defendants by complainant; that Ida E. Lane is wife of Moses H. Lane, and together they own one-half the stock of the defendant corporation and the other defendants are the father and brother of said Ida E. Lane; that said Moses H. Lane is the only one of the defendants familiar with said manufacturing business, and complainant is informed and believes that he was instrumental in getting up said circulars and selecting said name for the express purpose of deceiving the customers of said wagon company, and that all of defendants were acquainted with the terms of said sale before the formation of said corporation; that the name Kalamazoo Wagon Company had by its long use become known as a trade-mark in relation to the goods manufactured by them; that said complainant had the exclusive right to the use of the same, and that defendants had no right to use a name so similar to it as to mislead the public; that by the acts of defendants complainant had already been greatly damaged, and that a future use of the name Kalamazoo Buggy Company by defendants would still more tend to his detriment.

The prayer of the bill is that the defendants be perpetually enjoined from using said name, Kalamazoo Buggy Company, and from conducting their business or using circulars under such name, and from taking mail from the post-office addressed to the Kalamazoo Buggy Company, or to any other name of similar import, and from doing any other act calculated to mislead the public into the belief that they are identical with the Kalamazoo Wagon Company, and for general relief.

The answer of defendants admits the formation of the partnership of the Kalamazoo Wagon Company, and the sale of the interest of defendants Moses H. Lane and Ida E. Lane to complainant, but avers that the purchase-price for the property sold was based upon and was the value of the real estate and personal property, and that no price was set or paid for the good-will. The answer also admits the formation of the corporation known as the Kalamazoo Buggy Company; that such company built its building for the purpose of manufacturing at the point stated in the bill; that the defendants did issue circulars to the trade containing a description of their work, and cuts of the buggies and cutters manufactured. Their circulars were not the same as those issued by the Kalamazoo Wagon Company, but were similar to them,

and were the same as issued by hundreds of other manufacturers throughout this State and the United States, and by several other firms in Kalamazoo, among which was the Kalamazoo Carriage Works, which firm was doing business when the Kalamazoo Wagon Company was organized; and the cuts used were identical with those used by other manufacturers; that it was the usual custom of manufacturers to advertise their business by the use of such cuts and circulars, and there was no way of properly advertising them except in that way. It avers that the Kalamazoo Wagon Company nor any other person or firm had any exclusive right to the cuts or the particular style of circulars, and that every person engaged in the business was equally entitled to use them; that the Kalamazoo Buggy Company in fact made a better grade of work than complainant, and their mode of numbering their cuts was so different from complainant's that no one could be misled by the circulars; that at the time of the sale to complainant it was well understood by said complainant that defendants would erect a new manufactory on the very lots on which they did erect the same, and no objection was made to it by him, and that either of the parties who might sell out had the right to start a new business of the same kind.

The defendants deny that they selected the name Kalamazoo Buggy Company to injure the Kalamazoo Wagon Company or its good-will, but say that they selected the name because it correctly represented their business and the village in which they were located, and deny that complainant has been at all injured by the use of such name, or the good-will of his business impaired. They say that defendants have never held out to the public or to any one that their concern was the same as the Kalamazoo Wagon Company, but on the contrary they held out and advertised that they had no connection with that company, and they deny that the public generally was deceived or misled by any similarity in the names. They deny any right of complainant to the use of the said name, Kalamazoo Wagon Company, and also deny that said name is a trade-mark. They deny that since the formation of the defendant's corporation any considerable confusion of the mails of the two concerns took place. They say that in the beginning of defendants' business a few letters came to them intended for the Kalamazoo Wagon Company, which were immediately delivered to complainant, and that since that time to the time of commencing

suit no such difficulties had arisen, and that after defendants' corporation had become known to be in existence no confusion had existed. They aver that immediately after the sale to complainant, and before defendants went into business under the name of Kalamazoo Buggy Company, the complainant himself notified by circulars all of the customers and former customers of the Kalamazoo Wagon Company that the two companies, the Kalamazoo Wagon Company and the Kalamazoo Buggy Company, had no connection with each other, but were separate institutions. They insist that defendants have not only established their business under a corporate name, but have done so fairly and honestly, and they believe they had the perfect right to the use of their corporate name in carrying on their business; that they have not by the use of said name led any one to leave off trading with the complainant, and have done nothing except in the way of a fair competition to obtain any trade which might otherwise have gone to the complainant. Defendants further deny that complainant has stated any case in his bill which entitles him to relief in a court of equity, and pray the same benefit as if they had demurred.

A temporary injunction was granted on filing the bill, which afterward, on the coming in of the answer, was dissolved. When the cause came to a hearing on pleadings and proofs, a decree was rendered in favor of complainant, perpetually enjoining the defendants from carrying on their business under the name of the Kalamazoo Buggy Company, from distributing and issuing circulars under that name, or soliciting custom by travelling salesmen or otherwise from the persons who were the customers of the Kalamazoo Wagon Company on April 5, 1883, under the name of the Kalamazoo Buggy Company, and from receiving mail from the post-office addressed to the Kalamazoo Buggy Company, providing complainant delivered mail received by him in the name of Kalamazoo Buggy Company, which is intended for defendants, to them. The defendants appeal.

We are satisfied that the Circuit judge was right in his conclusion that the complainant has suffered serious wrong at the hands of these defendants. He purchased of Lane and his wife for a consideration, the adequacy of which is not disputed, all their interest "in the property, assets, money, good-will and all other property of every name and nature in and to the firm of the Kalamazoo Wagon Company;" and he was entitled to be put in possession of

what he bought. The good-will was a substantial part of the purchase, and purposely to take any steps to prevent his receiving the benefit of it was a wrong of the same nature as would have been the retention of some portion of tangible property belonging to the stock of the company. This good-will is to be found in the probability that the old customers of the establishment whose dealings with it have been satisfactory to them will continue their custom and commend it to others; and if those customers were to be invited and enticed away from the old establishment, and especially if they were to be deceived into dealing with a new establishment under the belief that it was the old, the value of the business thus lost would be so much taken from the value of the good-will which had been bought and paid for, and the invitation, enticement or deception that caused the loss would constitute a wrongful appropriation of property. Now the evidence, as we think, leads irresistibly to the conclusion that before their sale to complainant was made, and in contemplation of it, the Lanes had bought in the name of another a lot in the immedate vicinity of the existing establishment, upon which they had planned to erect buildings and put in machinery for the carrying on of the same business the Kalamazoo Wagon Company was engaged in, under a name closely resembling that which belonged to and was important to the protection of the business they had transferred, and that this was done in the hope and expectation that by so doing the benefit of the good-will they had sold might be in part appropriated by themselves. We think that to some extent this purpose has been accomplished by them; that some confusion in the mails has resulted, and that in some instances parties who intended dealing with complainant have been misled into dealing with defendants. And we also think that while complainant should have redress, he is entitled to the same remedies against the other defendants as against the Lanes. *Beal* v. *Chase*, 31 Mich. 490.

But while the wrong is plain, the remedy is not so obvious. The Circuit Court enjoined the defendants "from conducting the business of manufacturing carriages, buggies, wagons and cutters under the name of the Kalamazoo Buggy Company, either as designating a corporation or other business association of said defendants, and from issuing and distributing circulars and business cards under that name, and from soliciting custom by the agency of travelling salesmen or otherwise from the customers of the firm known as the

Kalamazoo Wagon Company who were customers of this firm on the 5th day of April, 1883, in any manner under the name of the Kalamazoo Buggy Company, and from receiving mail from the post-office addressed to the Kalamazoo Buggy Company," with a provision requiring complainant forthwith to deliver to defendants any mail received by him that was intended for defendants or either of them. This decree we think is right except the clause respecting the mail. It is not at all likely that any great number of letters intended for complainant will fall into the hands of defendants by reason of being erroneously addressed to the Kalamazoo Buggy Company, and it is not suggested or intimated that the large majority of letters and other mail matter received at Kalamazoo to that address will not be intended for defendants. Under such circumstances to require all such mail to pass through the hands and under the scrutiny of complainant would cause a greater wrong than it would redress. This portion of the decree must therefore be so modified as to leave the defendants to receive all such mail, but requiring them forthwith to deliver to complainant all that shall appear to have been intended for him or for the Kalamazoo Wagon Company.

With this modification the decree will be affirmed, and complainant will have costs of both courts. The redress awarded may be inadequate, but it seems to be all the case will admit of.

The other justices concurred.

Conrad v. Saginaw Mining Company.

(54 Mich. 249.)

Fixtures of trade — right of removal.

As between landlord and tenant, engines and boilers erected by the tenant on brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches; and dwellings erected by him for his employees, standing on posts or dry stone walls piled together, all intended to be merely accessory to the tenancy, and without intention to make them permanent, and capable of removal without material disturbance to the land, are trade fixtures, removable at or before the termination of the lease.

INJUNCTION. The opinion states the case.

F. O. Clark, for complainant.

Hayden & Young, for appellee.

CHAMPLIN, J. In the year 1871, David W. Allison and Edmund Heather were owners of certain wild land in section nineteen, township forty-seven north, range twenty-seven west in Marquette county; and on the ninth day of September of that year they made and executed a lease to Nicholas Lonstorf, John B. Maas and John P. Mitchell, as follows:

[Omitted; sufficiently stated in third paragraph from close of opinion.]

Under this lease Lonstorf, Maas & Mitchell went into possession and mined for iron ore thereon until December, 1872, during which time they erected a few buildings and some machinery for mining purposes. The land was mostly swamp and woods, and was of small value except for mining purposes, and at the time the lease was executed there were no buildings or improvements thereon. In April, 1872, the complainant, who previously had held an equitable interest, acquired by deed from the owners named, an undivided one-sixth interest in the land in question. In December, 1872, the defendant by purchase and assignment became possessed of all the rights of Lonstorf, Maas and Mitchell under the lease, and of all the buildings and machinery placed on the land by them up to the date of the assignment; and defendant thereafter operated the mine on the land up to October, 1882, when it ceased operations, claiming that the ore was practically exhausted in the mine and that it would not pay to keep the pumps going or the men at work. After defendant purchased in 1872, it removed nearly all the machinery which had been used by the lessees, and replaced it with a heavier and more expensive kind, and at various times down to the suspension of active operations in 1882, it repeatedly removed some portions of the machinery, replacing it or not as its own convenience or necessity required, all of which in a general way was known to complainant who made no objection.

Various engine and pump-houses, as well as temporary residences for miners were also erected upon the land by defendant from time to time as its convenience or the necessities of mining operations required; some of which — the engine and boiler-houses — were very substantially built, the beds for engines being built of solid masonry;

but all the erections for supporting and sheltering machinery were required by the nature of their use to be substantial in order to be useful.

The dwellings, to the number of thirty-five or forty in all, erected at different times, were mostly of a very temporary kind, very cheaply built, a large proportion being built of logs at an expense of $75 to $150 each, and fourteen or fifteen were frame, costing $500 to $1,000 each. Some were set on posts and some on dry stone wall piled together, and all now nearly worthless. All erections, whether of machinery or buildings, were made and paid for by defendant exclusively for "mining purposes," and were used for no other purpose, though capable of being used at other mines. The total cost of all machinery and buildings placed on the land by defendant at different times was from $50,000 to $60,000.

After the defendants had ceased to operate the mine under the claim stated, they notified complainant of their abandonment of mining operations and of their intention to remove their plant and property from the land leased, and offered to sell the same to the owners of the land if they desired to purchase. Complainant entered into negotiations for the purchase thereof, but without concluding the same, filed his bill of complaint, stating as follows:

"That under the provisions of said mining lease buildings have been erected upon said property in a very substantial manner, and have become fixtures to the freehold. There have also been erected solid brick and stone foundations upon which have been placed large engines, which have been bolted down solid to the ground. There have also been placed in brick arches large boilers connected with said engines, which have been walled in with brick in said arches built from the ground, and bolted down in the most substantial manner, which brick and stone foundations and arches and engines and boilers have become fixtures to the freehold and a part of the realty; that they were erected upon said property by agreement under said lease, but there was no agreement whatever in said lease permitting the removal of the same upon the surrender of the lease or the expiration of the same, or at any other time, so as to lessen the value of said property and to dismantle said mine and deprive it of its proper equipment of machinery and buildings so permanently affixed to the property;" and praying therein "that said defendant, its servants, agents and attorneys may be restrained by the injunction of this court, and be decreed to forever desist

from tearing up and removing said permanent fixtures, except upon replacing the same with as good at the time of the removal, and not to tear up or remove unless the sucessful working of said mine shall require it, and upon replacing the same with machinery of at least equal value."

The question involved is whether the machinery and buildings placed upon the land have been so affixed to the soil as to become part of the realty so as to preclude the defendant from removing them at or before the termination of the lease. It was conceded that the machinery in question was of the character denominated "trade fixtures," and that the intention with which they were annexed as well as the purposes for which they were used, would have a material bearing upon the case. Consequently a large part of the testimony was directed to the manner in which the property has been assessed for taxes; complainant claiming that the property in dispute had generally if not wholly been assessed as real estate, and under the provisions of the lease, been paid by the owners of the land. On the other hand, the defendant's evidence tended to show that the property in question had always been assessed as personal property to the defendant, and it had paid the taxes levied thereon. The complainant testified to the custom in that vicinity of inserting clauses in mining leases giving tenants the right to remove fixtures, but the instances within his knowledge were all subsequent to the time when this lease was executed. The defendant showed by one witness that the custom testified to by complainant was not universal, and that during a residence of seventeen years in the county it had always been the custom, with every lease he ever had any knowledge of, for the lessees to have the privilege of removing the machinery or any personal property erected thereon, The evidence of custom introduced by both parties is not sufficient to afford any assistance in the construction of the contract between them, or in determining the question before us and must be laid entirely out of view.

The rights of the parties must be determined from the lease existing between them, in connection with the nature and use of the property, and the intention of the tenants in making the annexation. While there are certain general principles applicable to all cases arising between landlord and tenant, as to what annexations are removable and what not, yet each case must in a great measure depend upon its own peculiar circumstances and the intention of the

party, and the time and manner of making the annexation, which will be of controlling influence in the correct disposition of the questions involved.

It will be noticed that the lease contains no clauses reserving the right of re-entry in case of condition broken or failure to perform the covenants by the lessees, and that it entirely omits the clause usually contained in leases requiring the lessees at the expiration of their lease to yield up the premises in good repair. The lease contains no stipulation as to whether annexations made during the term shall remain or may be removed. The effect of the omissions is to leave the question of intention to be gathered from the stipulations the parties saw fit to embody in the contract between them, in connection with what they have done in the execution thereof. At the time the contract was entered into the mine was undeveloped, and there might or might not be ore found in sufficient quantities to warrant mining operations. The grant was to the parties of the second part and their assigns of the right of entering upon the lands for the purpose of searching for iron ore, and of conducting mining and quarrying operations to any extent they may deem advisable for the term of fifteen years; and the further right to use all the wood and timber standing on the lands as should be necessary for mining purposes, and to erect such buildings and machinery upon the land, and to lay such railroad tracks and tram-ways, and make such other roads as might be necessary and convenient for mining, and to use therefor any timber that might be standing upon the land. This grant of the right to use the timber was a concession by the lessors to the lessees, and does not in any manner affect the matter in dispute.

From the testimony in the case we have no doubt that the machinery and buildings were intended to be accessory to the mining under the provisions of the lease, and that there was no intention in affixing them to the realty to make them accessory to the soil; and it appears that they can be removed without material disturbance to the land. They were such structures as the defendant had a right to erect on complainant's land, and therefore the defendant occupies a position materially different from what it would be in if it had wrongfully annexed such machinery and buildings to the soil of another. Furthermore it very plainly appears that the property in dispute was not annexed to the land for the better enjoyment of the land itself, but for the exclusive purpose of carrying

on the mining operations; and the manner of the annexation also tends to show that it was designed for a temporary purpose in connection with the lease under which the defendants were operating.

Under the facts disclosed by the record in this case, we think the Circuit Court was right in entering a decree dissolving the injunction and dismissing the complainant's bill, and the decree is affirmed with costs.

Decree affirmed.

The other justices concurred.

Bowen v. Detroit City Railway.

(54 Mich. 496.)

Railway — in street — duty as to snow.

In clearing the snow from its track a street railway company is bound to dispose of it so as not to interfere unnecessarily with the safety and convenience of persons using the street, and in case of extraordinary snow-falls must use extraordinary efforts to that end.

ACTION for injuries to horses and sleigh by negligence. The opinion states the case. The plaintiff had judgment below.

Brennan & Donnelly and *Fred A. Baker*, for appellant.

Otto Kirchner, for appellee.

CHAMPLIN J. The defendant is a corporation operating about eighteen miles of street railway in the city of Detroit. One of its lines is upon Woodward avenue, which consists of a double track. The ordinance under which it is permitted to run and operate its railway requires that it shall keep its track clear from snow. To do this expeditiously it uses Day's improved scraper, which is so constructed as to force the snow accumulating on its tracks to the side thereof to a distance of about six feet, and attached to the scraper or snow-plow, as it is sometimes called, is a lever extending beyond about four feet, which serves to level down the ridge of snow thrown out by the scraper. This lever is adjustable, and can be raised or lowered. It usually passes about twelve inches above the ground. In ordinary snow-storms this apparatus so disposes of the snow that no inconvenience is occasioned to the public travel.

On the night of February 2, 1883, a severe snow-storm set in, and continued to fall until the night of the 3d. The snow was very damp, mixed with rain, and packed so firmly when removed by the snow-plow that the leveler failed to distribute it, and it was left in ridges on either side of the tracks, varying in height from two to three feet. On the 3d the weather turned cold, and by three or four o'clock it froze very hard, which had the effect to completely coat these ridges with ice. On Monday, the 5th, the defendant endeavored to level down these ridges by taking a large stick of timber loaded with iron, and hitching spans of horses to each end, and so break them down, but without success. It then took a large plow it had for grading streets, and that broke them up in such large lumps that it was more dangerous than to let them remain as they were, and nothing more was done to remove them. The plaintiff resided at No. 1095 Woodward avenue, and on the evening of the 6th of February, 1883, he was proceeding along Woodward avenue with his son in a sleigh, his team being driven by his coachman toward his home. There was not sufficient room for teams to pass each other between the ridge of snow above described and the curb-stone. On reaching a point opposite the residence of a Mr. Farrington, a grocery delivery wagon was standing in the passage-way between the ridge and the curb. To pass this wagon, the driver crossed over the ridge to the street-car tracks, and continued on in the rear of and following one of defendant's cars, until it stopped for some cause, and plaintiff's team passed around the car in the space which had been cleared of snow, and proceeded on until they were about to meet another car coming from the opposite direction, when at the intersection of Warren with Woodward avenue, the driver again attempted to cross the ridge to the driveway between it and the curb, and in crossing the ridge at this point the sleigh upset, the persons in it fell out and the horses ran away. The horses and sleigh were injured, and plaintiff brought this action to recover his damages, which he claims were occasioned by the act of defendant in creating these ridges of snow.

The declaration in the case does not allege that the act of the defendant was unlawful or even wrongful; nor does it aver any duty owing by defendant to the public or to plaintiff, nor negligence in the discharge of any duty. The defendant insists that removing the snow from its tracks in the manner shown by the testimony was a lawful act, and properly performed, and that the only possible

ground upon which the defendant could be made liable would be because it did not remove the ridges within a reasonable time, and that there can be no recovery in this case under the declaration, because there is no averment that defendant neglected to remove the ridges of snow within a reasonable time. On the other hand, the plaintiff's contention is that the ridges constituted a nuisance in the public street, and that the defendant is liable for all damages sustained by the plaintiff in consequence of placing them there.

It may be considered as settled at the outset that these ridges of snow constituted serious and dangerous obstructions in the street, which interfered with the safety of the public travel and use of the streets, and unless authorized by law were *per se* nuisances. But if authorized by law they cannot be considered nuisances. Our attention has not been called to any statutory authority which expressly authorizes the defendant to cast the snow from its tracks into the adjacent street. The statute conferring authority upon street railway companies to incorporate and to use streets is embraced in How. Stat. chap. 95. They are authorized with the consent of the corporate authorities of the city, under such rules, regulations and conditions as such corporate authorities may prescribe, to construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of the streets. In constructing the railway they are required to conform to the grade of the streets established by the corporate authorities, and to lay the track in such mode and with such kind of rail, and to keep the railway and that part of the street and pavement within and adjacent to the track in such condition and state of repair as prescribed and provided in the consent, grant or agreement of the municipal authorities permitting the construction of the railway. The corporate authorities are authorized to prescribe by ordinance or otherwise such rules and regulations in regard to the street railways as may be required for the grading, paving and repairing the street, and to prevent obstructions thereon. It is made a misdemeanor, punishable by a fine not exceeding $500 or imprisonment in the county jail not more than one year, for any person to willfully obstruct, break, injure or destroy any railway constructed or operated under that act, or any work, car or building belonging to, or in possession of the street railway company. There is nothing in this legislation that grants expressly to defendant any rights in the public streets except for constructing, maintaining, owning and

operating a street railway, and by implication such rights as are necessary to carry out the purposes of the grant, and no more of the street is granted than is necessary for that purpose. The franchises conferred are to be enjoyed in common with and not in exclusion of the public in the street for the uses and purposes of a highway. It is a matter of common notoriety that all railways must have a clear track in order to be operated at all, and that accumulations of ice and snow must of necessity be removed. And it may fairly be presumed that the legislature intended that companies organized under the act should keep their track in condition to be operated for the accommodation of the public at all seasons of the year, and that the street adjacent to the track might be used as a place of deposit for the snow that accumulates at certain seasons, in such manner as should not interfere with the rights of the public in the use thereof as a public highway, or of private individuals as owners of adjoining property.

Although the legislature by implication granted the right to defendant to deposit the snow from its tracks upon the sides of the street, the company notwithstanding was bound to exercise the right conferred in a manner consistent with the rights of the community in the use of such street, and it was also bound to exercise the highest degree of care to prevent injury to the persons and property of those affected by its acts. And while it is implied from the legislative grant to operate the railway that the snow may be deposited or thrown to the sides of the tracks, yet it will be observed that the method to be employed to accomplish the object of keeping the tracks clean is left with the company to determine; and where there are different methods which may be pursued by which the authority given may be exercised, by one of which the snow would be left in such a manner as to become a nuisance, and another not, that method must be adopted which will not create a nuisance. Every person having occasion to use the public streets for the purpose of travel or passage is entitled to feel that he is absolutely safe, while exercising ordinary care, against all accidents arising from obstructions in the street, and no one has the right, without special authority, to materially obstruct it or render its ordinary use dangerous. It is evident that the rights of the public and of the defendant may both be secured in the reasonable use of the streets at the same time, and the railway company be enabled to discharge its duty to the public who rely upon or choose to pat-

ronize it, and the travelling public be enabled to use the streets with safety.

It is the duty of the company, in removing the snow from its tracks, to adopt such a mode as will not create obstructions in the streets to the detriment or danger of the public in the ordinary use thereof. If it can deposit the snow in the streets upon the sides of its tracks in such manner as not to interfere with the use of the street as a public highway, there appears to be no good reason why it may not adopt that mode of disposition, but in doing so it can not be permitted to leave it in ridges or piles which would obstruct the streets and make them unsafe or dangerous for vehicles to pass along or cross them. Its rights in this respect are subject and not paramount to the rights of the public to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the use of the street by the public are unlawful. Was the manner adopted by the defendant to dispose of the snow a proper one? The testimony is that the means employed were the most expeditious and best adapted to the purpose of any known appliance, and the one in general use by street railway companies. It also appears from the testimony that ordinarily the snow was not left in ridges, but was levelled off and distributed so that it was not dangerous to the public in using the streets; but in this instance the snow was not levelled off, and remained in ridges, forming dangerous obstructions to travel. The defendant insists that this was not owing to any fault of defendant, but to the extraordinary nature of the storm, rendering it impossible for the machine to distribute the snow as it was forced from the track. If this was an extraordinary storm, the defendant was called upon to put forth extraordinary exertions, not only to clear its tracks but to see that in so doing it did not create an obstruction in the street which would interfere with the public use thereof; and if obstructions were unavoidably made by the mode it employed to clear its tracks of snow, it became its imperative duty to remove such obstructions within a reasonable time, and if it failed to perform this duty it must be held responsible for the consequence to any one in the exercise of ordinary care who has suffered an injury thereby.

The question of reasonable time, in the absence of controversy respecting the facts, or where they are conceded, is one of law for the court to determine, and is defined to be "so much time as is necessary, under the circumstances, to do conveniently what the con-

tract or duty requires in the particular case should be done." In this case there was no controversy about the facts. The snow ceased to fall on the 3d, and the accident happened on the evening of the 6th. It is manifest that a reasonable time in which such ridges could and should have been reduced had elapsed before the accident happened. Nothing was done by the defendant until the 5th, when an effort was made to level the ridges with a stick of timber, which was unsuccessful. Next a plow was used, which did not work satisfactorily, and then the effort was abandoned. Considering the dangerous nature of the obstructions, the defendant was reprehensibly negligent, and showed an utter disregard of the public welfare. It cannot be doubted that other and more ordinary and effective means were at hand, and should have been resorted to. It is unnecessary to mention them. They readily suggest themselves to persons of usual intelligence. The defendant neither removed the obstructions nor excused its want of diligence in removing them, and is justly responsible for the consequences of placing them in the street.

The defense insisted upon, that the defendant is not liable for placing the obstructions in the street, but if at all, for not removing them in a reasonable time, is rather technical. If it should be conceded that it was lawful for the defendant to create the obstruction in the first instance, yet if allowed to remain an unreasonable length of time, it became unlawful from the beginning, and in an action to recover for the injury caused by the obstruction it is proper for the plaintiff to base his right of action upon the obstruction as unlawful at the time of the injury, and it is not necessary to declare as for leaving it there an unreasonable time. It is matter of justification and defense. It is always a sufficient answer to say that the obstruction was in the highway only a reasonable time and for a lawful purpose. In coming to the conclusion they did, the jury must have found, under the charge of the court, that the plaintiff was in the exercise of ordinary care and did not contribute to the injury complained of, and that such injury was occasioned by the obstructions which defendant caused to be placed in the street and suffered to remain until the time of the accident. The charge of the court was substantially in accord with the views above expressed, and under the facts the plaintiff was entitled to recover, and the judgment is affirmed. *Judgment affirmed.*

COOLEY, C. J., and CAMPBELL, J., concurred; SHERWOOD, J., concurred in the result.

Davis v. Burgess.

(54 Mich. 514.)

Breach of peace—what is.

The use of profane, indecent and abusive language by one toward another on a street and in presence of others is a breach of the peace.

ASSAULT and battery and false imprisonment. The opinion states the case. The plaintiff had judgment below.

Edwin F. Conely, Henry A. Chaney and *William A. Moore*, for appellant.

Thos. R. Crisup and *William B. Jackson*, for appellee.

Sherwood, J. This is an action of trespass for assault and battery and false imprisonment. The plaintiff was a private citizen, and the defendant at the time of the arrest complained of was a policeman in the city of Detroit. On the 31st of August, 1882, the defendant claims he went into a pawnbroker's shop in Detroit to assist a young man in obtaining a watch he had left in pawn there; he saw the plaintiff, who was acting as clerk for the pawnbroker, Mr. Van Baalen, at the time, and Davis ordered him out of the shop, using profane and indecent language toward him as he left. The next day about noon Davis found Burgess upon the street and told him there was a gentleman at the pawnbroker's shop who wished to see him. Burgess went there in company with another officer, and while there Davis asked Burgess for his name and his number, which was given, and thereupon Davis called the defendant almost everything indecent, saying he would have his buttons off of him, etc., and would make complaint against him. Davis' language was very indecent and profane. This was while they were in the shop. Defendant did nothing but walked out of the shop and across the street, and then started for a street car. Davis followed him, continuing his profanity and abuse, calling the defendant a son of a bitch and other mean names, and by so doing gathered a crowd around them on the street, and then he went into his store. Defendant told him that such language should not be used upon the public street, and was about to enter the car when Davis again came upon the street, and standing upon the sidewalk

renewed his vile and profane attack upon defendant, who was then going across the street, hailed him and again assailed him with vulgar, profane and indecent language in the presence of citizens, among whom were ladies, passing along the street. Burgess went to the plaintiff and asked him for his name, which he refused to give, saying to defendant, "If you lay your hand upon me I'll shoot you," calling him at the same time a vile name. Defendant thereupon arrested the plaintiff, took him to the city attorney's office and made complaint against him under the city ordinance, which provides that "no person shall be guilty of using indecent or immoral languge, nor be guilty of any indecent or immoral conduct or behavior on any public street, lane, alley, square, park or space in said city," the penalty being fine or imprisonment. The city attorney took the complaint, but for some reason failed to prosecute it. Davis was discharged. This is the defendant's statement of the facts, and he claims that if found true by the jury they constitute a perfect defense to the plaintiff's action.

The defendant was sworn in his own behalf, and upon most of the material facts stated by him he was contradicted by the plaintiff, whose version of the matter presents an entirely different case, but with this we have little to do.

The court having charged the jury in substance that the only question for them to consider was that of damages, it is only needful for us to review the case as presented on the part of the defendant, and if from his showing he was not justified, the verdict must stand.

There seems to be no question that the official position of the defendant in the city of Detroit at the time the arrest was made constituted him a conservator of the peace. The arrest was made without warrant. At the time it was made (mid-day) the plaintiff was on the sidewalk, where citizens, men and women, were constantly passing and repassing, and there, in a loud, boisterous manner he called the defendant a "God damned son of a bitch," and continued to use other indecent language. When defendant asked for his name he refused to give it to the officer, and threatened to kill him if he laid his hands on him. Only a few minutes before the plaintiff had used the same and other profane language toward defendant in the presence of a crowd upon the street.

There is no question about the officer's right to arrest for a breach of the peace committed in his presence without process.

Did the language and conduct of the plaintiff on that occasion amount to a breach of the peace? The answer to this question must necessarily determine the decision in this case. The offense, whatever its character, was committed in the presence of the officers in the public street in a city, in the presence of citizens. The language used was not only vile and profane, but forbidden under penalties both by the by-laws of the city and the statutes of our State. It was against decency and public morals, of the most aggravating character, well calculated to arouse the passions and induce personal violence which was threatened if the officer laid hands upon the offender.

Now, what is understood by "a breach of the peace?" By "peace," as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is "a breach of the peace." It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens but of public morals without the commission of the offense. The good sense and morality of the law forbid such a construction. I think the language and conduct of Davis in this case, as appears on the record, shows him guilty of a breach of the peace, and in the act of committing it at the time he was arrested. The court should have submitted the defendant's case as he made it to the jury under proper instructions to ascertain the truth of the facts as stated by him and his witnesses. This the court did not do, and the failure was error.

The case of *Quinn* v. *Heisel*, 40 Mich. 576, cited by counsel for plaintiff, is not in point. In that case the officer who was sued for making the arrest, as the plaintiff's testimony tended to show, made it after the offense had occurred, and the testimony was submitted to the jury under a proper charge, who found for the plaintiff. Neither do I see any thing in *Sarah Way's* case, 41 Mich. 299, necessarily conflicting with the views here expressed.

It can make no difference that the officer was made the subject of the offender's wrong acts and conduct on the occasion. Officers

are entitled to the same protection as other persons. It was the offense against the public which the people could punish, and the officer only acted for them in making the arrest. He had no personal interest in the matter. If the people failed to prosecute further, it was not the officer's fault; and if the plaintiff was guilty of the offense for which he was arrested, he cannot have suffered from the failure to prosecute. I think the judgment at the Circuit should be reversed, and a new trial granted.

Judgment reversed.

COOLEY, C. J., and CHAMPLIN, J., concurred.

CAMPBELL, J. I am not satisfied that the case was not properly presented to the jury.

BOYD v. CONKLIN.

(54 Mich. 583.)

Water and water-course — surface-water — diverting.

A farm owner may not erect such barriers as will flood his neighbor's land with surface-water that would otherwise escape over his own, in order to reclaim the bed of a pond that has always existed on his own land, and get rid of the inflow.

TRESPASS. The opinion states the case. The defendant had judgment below.

A. L. Millard and *Bean & Underwood*, for appellant.

C. A. Stacy, for appellee.

CAMPBELL, J. Boyd sued defendants for removing part of a dam which he had built across the outlet which drained an adjoining highway and higher lands adjacent. Lorenzo D. Dewey owned a farm running north of the highway about half a mile, and a swale ran through this land from north to south which crossed the road through a culvert from which the water flowed across Boyd's farm to a pond on his land which has no surface outlet. The swale is crossed by an old beaver dam near its north end, and a creek called Evan's creek, a little to the north of it, sometimes overflows so that

the water runs over this beaver dam into the swale. The swale carries down all the surface-water on Dewey's land, and there was testimony tending to show that it was partly fed by springs, although this was disputed. Both farms are inclosed by a ridge which prevents any water passing from Dewey's land from escaping, except through the swale and into the pond, and there is no other way of draining the highway. The soil is clay, except to the south and east of the pond where it is gravelly, and where there is some escape of water by percolation, and possibly by a subterranean outlet. Both farms seem to have been in private hands for above fifty years. The road appears by the testimony to be the La Plaisance Bay turnpike, which was, as we are judicially informed by public statute, laid out in 1832 and built by the United States government, and subsequently became subject to State authority, and is now in charge of the ordinary town authorities. Just north of the road (which runs east and west on the section line between sections 32 and 29, in township 5, south of range 4 east) the swale widens on Dewey's land into a small pond. The pond on Boyd's land is never dry, and before he built the dam contained usually from six to eight acres, of which a space of several acres became dried by means of the exclusion of the water which came down from the lands above which had no other escape. The dam was a solid structure twelve feet thick at the base and seven on the top, about a hundred paces long, and higher than the highest part of the culvert or highway. Its effect was to submerge the road, and also to throw the water all back over the highway and upon Dewey, where it had no escape but by evaporation.

Boyd purchased the farm, which contains a little over ninety acres, in 1872, at which time there was no obstruction to the flowage. He first built the dam in 1877, and it was removed so as to give room for the water in 1878 by the highway commissioner. Being rebuilt, it was removed in 1879 by defendants, under the direction of the local authorities, Conklin himself being commissioner and acting in pursuance of their instructions.

The case as it is now before us presents no complications. The dam was built for the sole and express purpose of shutting out the water, which had its only outlet through the swale and over Boyd's land, and this was its original and natural outlet. It was not artificial but had always existed since the country was known; and the existence of a beaver dam makes it not unlikely that it was once a

running stream. Whether its waters are to any extent from springs or not, they include the whole surface drainage, and are not confined to passing storms. There is some testimony of occasional attempts by the lower owners to obstruct the water, but no evidence of acquiescence, and very little if any of submission by the highway authorities to such obstructions.

If this had been an artificial drainage, the long existence of the road, which could not be kept in repair without drainage, and the undisputed fact that a regular culvert has existed at least since 1845, and that no other drainage was possible, would in our opinion put plaintiff to very strong proof to overthrow the presumption of right. The court below gave the plaintiff the benefit of that analogy, and going very far in the endeavor to avoid giving occasion for cavil, limited defendant's justification to a substantially uninterrupted enjoyment of the drainage for twenty years without substantial objection to the public or highway authorities. But plaintiff insists that his right to intercept surface-water cannot be cut off in that way, and that except in case of living waters in a defined and regular channel, there is no such obstacle, or none without such an undisputed prescriptive right as would be equivalent to a grant.

On the argument the whole subject was discussed with much ability. It is not necessary however to consider any more of the legal theories than such as have some application on the facts.

The real question here was whether one land-owner can at his pleasure erect such barriers as will flood his neighbor's land with water that otherwise would escape over his own, in order to partially or wholly reclaim the bed of a pond which has always existed there, and get rid of the inflow. In its natural condition neither the highway nor the upper lands would be drowned. The effect of the dam is to cover portions of them with water that cannot escape.

It was urged strenuously on plaintiff's behalf that there is a radical difference between the common and the civil law upon the subject of the relations of upper and lower estates as to water easements and servitudes, and that at common law the latter owes no service to the former in regard to the flow of surface water. As we are not expected officially to be experts in the civil law, we shall not attempt to discuss that department of jurisprudence as a separate subject. But it so happens that from the time of Bracton down attention has been frequently called by the common-law courts to

the fact that the whole subject of rights in water has been defined by the civil-law writers in terms which substantially agree with the recognized rules of the common law, and that they agree very closely, not necessarily because one has been borrowed from the other, but rather because both are naturally drawn from the general usages and necessities of mankind. All of the considerations which belong to the present case depend on the reciprocal action on both upper and lower proprietors of the maxim that every man, in the use of his own property, must avoid injuring his neighbor's property as far as possible. And while the cases cited on the hearing show that courts have sometimes indulged in sweeping language, that taken independently would lead to remarkable results, the facts on which the apparently conflicting rulings rest greatly narrow their substantial repugnance. There are, it must be admitted, decisions that cannot possibly be harmonized. But their number and their force do not equal their apparent importance. And there is no subject on which local usages have had so much weight in shaping the local common law as the incidents of real estate. There are parts of the Union where the land laws have always differed from the common law of other States, while the law relating to water has been laid down in a large part of the United States in a uniform manner, without reference to their ancient condition as French, Spanish or English colonies. The civil-law definitions, or what are supposed to be such, are quoted as often under the one class of antecedents as under the other.

The chief differences pointed out on the argument, as important in weighing decisions as furnishing precedents, related to distinctions between living streams in a natural flow, and water of a different character in artificial escapes or in surface descents — to distinctions between urban and rural servitudes — and to the purposes for which dams or other interruptions are made.

It is not disputed that perennial flowing streams of living water impose similar duties and confer similar rights on all riparian proprietors under all systems of jurisprudence. It is not disputed that under what is claimed to have been the civil-law rule, the rural proprietor of lower lands was required to receive the water flow of surface water from the upper lands coming in substantially its natural amount and condition. Beyond this we cannot harmonize much of the contention of counsel, and must dispose of the case as it appears to us.

A number of the most striking cases cited by plaintiff's counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these, it was claimed that there was no substantial foundation for any distinction between urban and rural property.

There is no question but that such a distinction is recognized in the civil-law authorities referred to on the argument, as well as in several of the cases cited. The distinction is one of substance and not arbitrary. As already suggested, the adjoining owners owe mutual duties — the one to receive the natural flow, and the other not to injuriously change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface-water. Grades must usually be established for streets and sidewalks, and pavements and other surface changes are usual, in addition to the walls of buildings, which with their embankments must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially. And where the same rule has been applied to towns as to the country, it has in some cases at least been done expressly, because in the circumstances of the record the particular land in question had remained under rural conditions. If — as seems to be true — some decisions ignore the distinctions, they depart from the old rule, and cannot be maintained as harmonious with the general line of authority, unless on special facts which do not justify their broad dicta.

The Massachusetts cases lay down so broadly the right of the lower proprietor to cut off the water flowing down on him, that whatever distinctions may be found in their facts, the court evidently meant to disregard them. The Wisconsin cases perhaps go about as far, and the Indiana rule is stated in similar terms. It can hardly be said that there is any fixed New York rule which would apply to such a case as the present. In the case of *Barkley* v. *Wilcox*, 86 N. Y. 140; s. c., 40 Am. Rep. 519, where the interference with the water was by building and banking up a house near a street, the facts did not call for any very general discussion, and the court, while expressing a preference for the views of the Massachu-

setts courts over the rule in Pennsylvania and other States to the contrary, saw the necessity of caution in adopting those views too universally, and left the door open to deal with cases like this on their own footing. In *Bowleby* v. *Speer*, 2 Vroom, 351, the facts and the decision were like those in *Barkley* v. *Wilcox*, but can hardly be said to disturb the earlier case of *Earl* v. *De Hart*, 1 Beasl. Ch. 280, where the civil-law principle was treated as in some cases furnishing a proper rule for town property which was not so situated as to require a different treatment.

Mr. Washburn, in his treaties on Easements (p. 355), indicates that the Massachusetts rule is not sustained by the weight of American authority, and that the rule known as the civil-law rule has been more generally accepted. He cites most of the authorities brought to our attention on the argument, and they unquestionably sustain the existence of duties between the respective land-owners to do no harm to each other against the natural servitude.

Much of the discussion found in the cases referred to turns, not on the right of the upper owner to have egress for his water, but upon the right of the lower owner to have the water come down. In the present case, Boyd does not seem to desire this supply. But it is quite supposable, that if this pond were not entirely on his premises, it might be of some importance to the neighboring land that it should not be diminished or destroyed.

It is not necessary on this record to determine how far defendants could themselves have shut off the supply, because it is evidently not for their interest to do so. But there is no lack of cases which hold that rights may exist in a flow of water which is not a natural living stream. And while here, as in other cases, the rights of parties must depend somewhat on the circumstances and surroundings, the general principle underlying all the cases is that the upper and lower owners must respect any valuable rights which accrue to either from the position of their lands. The narrow definition of water-courses as natural living streams, which appears in a few cases in the United States, is not an ancient or universal definition. On the contrary, water running in a natural or artificial bed is very frequently, if not generally, so regarded. But names are of small importance, inasmuch as the only consideration that need be looked at is the character and surroundings of the flowage. The following authorities recognize valuable rights in water, and some of them are spoken of expressly as water-courses,

which are entirely distinct from natural living streams. Woolrych Waters, 3, 146–7; *Wright* v. *Williams*, 1 M. & W. 77; *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, 11 Exch. 602; *Beeston* v. *Weale*, 5 El. & Bl. 986; *Ivimey* v. *Stocker*, L. R., 1 Ch. App. 396; *Watts* v. *Kelson*, 6 Ch. App. 166; *Nuttall* v. *Bracewell*, L. R., 2 Exch. 1; *Holker* v. *Poritt*, L. R., 8 Exch. 107; *Taylor* v. *Corp. of St. Helen's*, 6 Ch. Div. 264; *Mayor* v. *Chadwick*, 11 Ad. & E. 571; *Chadwick* v. *Marsden*, L. R., 2 Exch. 284.

Upon such questions as are raised on this record there is, except in the Massachusetts doctrine and the cases which have followed it, very little conflict of opinion. Whatever may be the rights of adjoining proprietors as to the use and diversion of water, there is no right in any one, by raising artificial obstructions, to flood his neighbors' lands, by stopping the escape of water that cannot escape otherwise. Some cases have intimated that there might be larger rights of obstruction where the particular drainage was not necessary. But actual mischief done as a natural and necessary consequence of such erections is almost universally treated as an actionable nuisance. *Lawrence* v. *G. W. R. Co.*, 16 Q. B. 643; *Rylands* v. *Fletcher*, 3 H. L. 330; *Tootle* v. *Clifton*, 22 Ohio St. 247; Wood Nuis., § 386; *Hurdman* v. *N. E. Ry. Co.*, 3 C. P. Div. 168; *Whalley* v. *Lancashire & Yorkshire Ry. Co.*, 13 Q. B. Div. 131; summarized in 30 Alb. L. J. 3; *Broder* v. *Saillard*, 2 Ch. Div. 692; *Gillham* v. *Madison Ry. Co.*, 49 Ill. 484; *Gormley* v. *Sanford*, 52 Ill. 158; *Ogburn* v. *Connor*, 46 Cal. 346; s. c., 13 Am. Rep. 213; *Butler* v. *Peck*, 16 Ohio St. 334; *Nevins* v. *City of Peoria*, 41 Ill. 502; *Livingston* v. *McDonald*, 31 Iowa, 160; *Hooper* v. *Wilkinson*, 15 La. Ann. 497; *McCormick* v. *Kansas City R.*, 70 Mo. 359; s. c., 35 Am. Rep. 435; *Shane* v. *Kansas City Ry.*, 71 Mo. 237; s. c., 36 Am. Rep. 480.

As previously suggested, the rights of upper and lower owners are not treated by the common-law authorities as peculiar to either common or civil law, but as natural incidents to the land, which are and must be analogous as governed by universal jurisprudence, except where specially modified. The English courts have never hesitated to cite the civilians on such questions, and they have decided cases arising out of England without attempting to inquire into any local law as the basis of decision. Thus in the East Indian case of *Rameshur Pershad Narin Singh* v. *Koonj Behari*

Patluk, 4 App. Cas. 121, the rights of the parties were dealt with just as if they had arisen in England, although the uses of tanks and reservoirs in India must in all probability have grown into very ancient customs. In *Smith* v. *Kenrick*, 7 C. B. 715, the Digest was cited as authority. In *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282, and in *Embrey* v. *Owen*, 4 Eng. L. & Eq. 466, it is stated that these various rights are not to be regarded as based on any presumption of grants, but as incidents to property *jure naturæ*. Bracton is cited in Wood Nuis., § 386, as coinciding with the civil-law rule. While he has been regarded as drawing too much from the Roman law in some other matters, no one has doubted that he laid down the common law correctly on this. Britton lays it down very clearly that no one can drown his neighbor's land by erections on his own soil. "Appurtenances," fol. 140. The civil-law rule was recognized and adopted in the customary as well as in the written law in parts of France, and in Canada and Scotland, and the Roman law in all these regions was modified by local usage, and in many things repudiated. In Basuage's Commentary on the Custom of Normandy it is not treated as a civil-law rule, but as a law of nature. 2 Basuage, 565. In *Frechette* v. *La Compagnie Manufacturière De St. Hyacinthe*, 9 App. Cas. H. of L. 170, the Lower Canada Code is quoted, which seems to be a substantial if not a literal transcript of section 640 of the French Civil Code, and regulates the rights of both classes of owners, forbidding the lower owner from hindering the escape of water by dikes, and forbidding the upper owner from aggravating the flow to the injury of the lower estate. In discussing this clause, a learned writer on the law of property, Charles Comte, speaks of the term "servitude," which strictly denotes a diminution of rights, as an unfortunate and improper phrase to apply to these reciprocal duties. "It is simply a means of preventing usurpation, and of securing to each that which belongs to him." While Erskine in his "Principles of the Law of Scotland," uses the term "servitude" as including the rights in question, he speaks of them as natural, as contradistinguished from legal servitudes. Book 2, tit. 9. Domat refers to them in the same way, dividing servitudes into those which are natural, and those which do not rest on natural right. Book 1, tit. 12, § 5. And this is further illustrated by his collection of excerpts from the Roman law. 4 Domat, 423.

There seems to be no reason for attempting to draw distinctions between the civil and the common law on this subject. The authorities recognize the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice and in disregard of the relative conditions arising from its position. Each may do in using his own what is consistent with the fair interests of the other.

The escape of water in the present case is natural and is necessary, and there was no right to prevent it by such a dam as defendants broke through. The charge given was at least as liberal as plaintiff had a right to ask.

Judgment affirmed.

CHAMPLIN and SHERWOOD, JJ., concurred; COOLEY, C. J. did not sit.

INDEX.

ABATEMENT.

Action for death by negligence.] A statutory cause of action for death by negligence abates by the death of the wrong-doer. *Hegerich* v. *Keddie* (99 N. Y. 258), 25.

Of nuisance.] *See* CONSTITUTIONAL LAW, 178.

See NUISANCE, 716.

ACTION.

1. **Assault by officer of State charitable institution.**] An action does not lie against a State house of refuge for an assault on an inmate by an officer thereof. *Perry* v. *House of Refuge* (63 Md. 20), 495.

2. **Creditor's bill—execution, nulla bona.**] It is essential to the maintenance of a creditor's bill to reach equitable interests, that it shall allege that execution has been returned unsatisfied on a judgment against the debtor. *Baxter* v. *Moses* (77 Me. 465), 783.

3. **Trust — statute of limitations.**] Directors of a corporation are not such trustees as are debarred from setting up the statute of limitations. *Id.*

To compel issue of stock.] *See* CORPORATION, 84.

See ABATEMENT, 25; CORPORATION, 339; EJECTMENT, 186; EXECUTOR AND ADMINISTRATOR, 538, 706; SEDUCTION, 385; TORT, 747; TRUST, 802; WATER AND WATER-COURSE, 951.

ADVERSE POSSESSION.

1. **By devisees.**] Devisees holding possession of land under a will duly proved and recorded, for the statutory period, will gain title although the will is afterward set aside; and the possession of a tenant for life inures to the benefit of the remainderman. *Brown* v. *Brown* (14 Lea, 253), 169.

2. **Of street.**] Title to a street cannot be acquired by adverse possession by a private person. *Visalia* v. *Jacob* (65 Cal. 434), 303.

AGENCY.

Lease — execution.] A lease reciting that it is made by "M., agent of D.," and signed in the same manner, is the contract of the principal. *Avery* v. *Dougherty* (102 Ind. 443), 689.

ALIMONY.
See MARRIAGE, 779.

ALTERATION.
See EVIDENCE, 417.

ANIMALS,
See NEGLIGENCE, 702.

APPURTENANCES.
See LANDLORD AND TENANT, 861.

ARREST.
See BREACH OF PEACE, 828.

ASSAULT.
See ACTION, 495; CRIMINAL LAW, 209.

ASSIGNMENT.
See EXECUTOR AND ADMINISTRATOR, 446; INSURANCE, 245, 816.

ASSIGNMENT FOR CREDITORS.

Provision for private sale.] A provision in an assignment for creditors that the assignee shall sell the goods at private sale does not render the assignment fraudulent on its face. *Kyle* v. *Harveys* (25 W. Va. 716), 235.

ASSOCIATION.

Unincorporated — liability of members.] Persons contracting in the name of an association which is unincorporated are personally liable. *Lewis* v. *Tilton* (64 Iowa, 220), 436.

BAGGAGE.
See CARRIER, 6.

BAILMENT.

Agricultural society — loss of exhibitor's articles.] An agricultural society, inviting persons to lend articles for exhibition at a fair, and promising to take care of them, is responsible if they are stolen by its negligence. *Vigo Agricultural Society* v. *Brumfiel* (102 Ind. 146), 657.

BANK.

1. **Agency — collection.**] The owner of a domestic note left it with a bank for collection, and if not paid to fix the indorser's liability. It was not paid, and the bank, according to custom, gave it to a notary for protest. *Held*, that the bank was not liable for his neglect. *Bank* v. *Butler* (41 Ohio St. 519), 94.

2. **Fraud — insolvent bank receiving deposit.**] A bank hopelessly insolvent, to the knowledge of its president received a deposit from a customer and immediately thereafter suspended business and went into the hands of a receiver. *Held*, that the customer might recover the deposit. *Cragie* v. *Hadley* (99 N. Y. 131), 9.

See FRAUD, 264.

BAR.

See CRIMINAL LAW.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENT.

BOUNDARY.

See DEED, 519, 700.

BREACH OF PEACE.

What is.] The use of profane, indecent and abusive language by one toward another on a street and in presence of others is a breach of the peace. *Davis* v. *Burgess* (54 Mich. 514), 828.

BRIDGE.

See MECHANICS' LIEN, 67.

CARRIER.

1. **Railroad—unlawful expulsion.**] The plaintiff having purchased at Birmingham a ticket to Hanceville, a station ten miles beyond Blount Springs, entered a freight train which was not authorized to carry passengers beyond Blount Springs; he testified that the ticket agent directed him to take it; being informed by the conductor, after starting, that he could not be carried beyond Blount Springs, he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on, and having surrendered his ticket, which the conductor thereupon cancelled, he travelled to Blount Springs, and was there required by the conductor to leave the train. *Held*, that the company was not liable unless the ticket agent gave that direction. *South and North Alabama Railroad Company* v. *Huffman* (76 Ala. 492), 849.
2. **Baggage—conversion.**] The plaintiff went to defendant's station at Philadelphia to take passage for Chicago. The baggage-master refused checks for his baggage unless he paid for extra baggage. The plaintiff refused this and demanded his baggage. The baggage-master declined to deliver it on the ground that it was not accessible before train time. The plaintiff refused to take passage. The next day the defendant's president promised to stop the baggage at Pittsburgh and gave him an order for it. He thereupon took passage on defendant's road for Chicago. On arriving at Pittsburgh he applied for the baggage, but was told that it had gone on to Chicago, and received an order on the Chicago agent for it. It arrived at Chicago that day, was stored at the station and the next night was destroyed by fire. The plaintiff stopped over at Pittsburgh one day and arrived at Chicago the next. *Held*, that there was a conversion of the baggage at Philadelphia and no waiver of any claim therefor. *McCormick* v. *Pennsylvania Central Railroad Company* (99 N. Y. 65), 6.
3. **Duty as to perishable property.**] A railway company is not bound to transport perishable property to the exclusion of other general freight not

CARRIER — *Continued.*

perishable. *Dixon* v. *Chicago, Rock Island and Pacific Railway Company* (64 Iowa, 581), 460.

4. **Of letters — liability.**] A common carrier, who is also a contractor with the government for carrying the mails, is not liable as a common carrier to the sender of a letter by mail for its loss. *Central Railroad and Banking Company* v. *Lampley* (76 Ala. 357), 334.

5. **Passenger becoming sick — removal.**] Where a railway passenger has *delirium tremens*, annoys and frightens the other passengers, and becomes insensible, he may be removed at a station and put in charge of an overseer of the poor. *Atchison, Topeka and Santa Fe Railroad Company* v. *Weber* (33 Kans. 543), 543.

See DAMAGES, 258; INSURANCE, 728; RAILROAD, 849.

CHEATING.

See CRIMINAL LAW, 889.

CONDITION.

See DEED, 121.

CONFLICT OF LAWS.

See EXECUTOR AND ADMINISTRATOR, 344, 446; SALE, 547; WATER AND WATER-COURSE, 261.

CONSTITUTIONAL LAW.

1. **Abatement of nuisance.**] The legislature may authorize the destruction of unhealthy houses as nuisances. *Theilan* v. *Porter* (14 Lea, 629), 772.

2. **Double Damage Act.**] The statute making railroads liable in double damages for stock killed in consequence of their neglect to fence is constitutional. *Humes* v. *Missouri Pacific Railway Company* (82 Mo. 221), 369.

3. **Excise.**] A statute authorizing villages having colleges and universities within their limits to provide against the sale of intoxicating liquors within such villages is constitutional. *Bronson* v. *Oberlin* (41 Ohio St. 476), 90.

4. **Impairment of office.**] Where a judge has been elected by the legislature, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although it diminishes his compensation. *Foster* v. *Jones* (79 Va. 642), 637.

5. **Judgment against town — levy on goods of inhabitants.**] A statute authorizing the collection of judgments against towns out of the goods and chattels of the inhabitants is constitutional. *Eames* v. *Savage* (77 Me. 212), 751.

6. **Prohibiting substitutes for butter.**] A statute prohibiting the manufacture or sale for food of any substitute for butter or cheese produced from pure unadulterated cream or milk is unconstitutional. *People* v. *Marx* (99 N. Y. 377), 84.

7. **Reading in public schools.**] A statute providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required

to read it contrary to the wishes of his parent or guardian, is constitutional. *Moore* v. *Monroe* (64 Iowa, 367), 444.

8. **Right to electioneer.**] A statute forbidding judges and State school officers to electioneer is invalid. *Louthan* v. *Commonwealth* (79 Va. 196), 626.

9. **Rights of witness before legislative committee — contempt.**] The senate of New York directed its committee to investigate certain charges of fraud and irregularity made against the commissioner of public works of the city of New York. The relator, summoned as a witness before that committee, was at first allowed counsel. Having declined to answer certain questions on the advice of his counsel, the committee revoked the privilege of counsel. The counsel thereupon instructed him to withdraw and answer no further questions. He withdrew without the permission of the committee after being notified that his examination was not concluded. *Held*, a contempt, for which the senate might punish him. *People* v. *Keeler* (99 N. Y. 463), 49.

10. **State law regulating sale of patent rights.**] A State statute requiring vendors of patent rights to file with the county clerk an authenticated copy of the letters, with an affidavit that they are genuine and have not been revoked or annulled and that the vendors have authority to sell, is valid. *Brechbill* v. *Randall* (102 Ind. 528), 695.

11. **Taxation — "growing crops" — fruit trees.**] Fruit trees are not "growing crops" exempted by the Constitution from taxation. *Cottle* v. *Spitzer* (65 Cal. 456), 305.

See MUNICIPAL CORPORATION, 420.

CONTEMPT.

Right to hearing.] The false pretense of a defendant in a civil action that he is too ill to attend the trial, and the procurement of an adjournment thereby, is a contempt, but is not summarily punishable on affidavits in the absence of the defendant. *Welch* v. *Barber* (52 Conn. 147), 567.

See CONSTITUTIONAL LAW, 39.

CONTRACT.

1. **Public policy.**] S., an attorney at law, put into the hands of W., another attorney, a demand against T., under the agreement that T. was to be forced into bankruptcy, and if S. was appointed assignee he and W. should share the attorney's fees and assignee's commissions. *Held*, not invalid. *Redick* v. *Woolworth* (17 Neb. 260), 410.

2. **Sale for unlawful purpose.**] A contract to sell a house to one who intends to keep it as a bawdy-house is not illegal merely because the vendor knows the intention. *Sprague* v. *Rooney* (82 Mo. 493), 383.

3. **To support, erect monument, and buy masses.**] M., an aged married woman, put money in the hands of defendant with directions to use it for the support of herself and husband during their lives, and after the death of both to use the residue to pay their respective funeral expenses, and to erect a suitable monument, and the residue for masses for the repose of their souls, according to the ritual of the Roman Catholic church, both be-

CONTRACT — *Continued.*

ing Catholics. Defendant accepted the money upon the conditions stated. M. selected the kind of coffin and described the monument she desired, and specified the time for the celebration of the masses. She died first, then her husband, both intestate. Defendant expended a portion of the fund for the purposes specified, leaving a balance to be expended for masses. In an action by the administrator of the husband's estate to recover such balance, *held*, that the trust for support was valid, and as to the surplus there was a valid contract. *Gilman* v. *McArdle* (99 N. Y. 451), 41.

See MARRIAGE, 325; SUNDAY, 332; VENDOR & PURCHASER; WILL, 80.

CONTRACTORS.

See MASTER AND SERVANT, 129, 191.

CORPORATION.

1. **Capital impaired — buying in its own stock.**] A corporation whose capital was impaired bought in its own stock through an agent. The seller did not know who the purchaser was. *Held*, that the seller was liable to a creditor of the corporation. *Crandall* v. *Lincoln* (52 Conn. 73), 560.

2. **Foreign — action against, for personal injuries.**] A passenger injured in his person while travelling in Georgia on a railroad, incorporated only in Georgia, although extending to and doing business in Alabama, cannot maintain an action therefor in Alabama. *Central Railroad and Banking Company* v. *Carr* (76 Ala. 388), 339.

3. **Imputed notice through director.**] A. shipped a cargo to B., with authority to sell it for him, upon an absolute bill of lading in B.'s name. B. indorsed the bill of lading and pledged the cargo to the defendant bank, of which he was a director, as security for a loan to him, the loan being approved at a meeting of the board of directors, at which B. was present. *Held*, that B.'s knowledge was not imputable to the bank, and the bank was not liable to A. for conversion. *Innerarity* v. *Merchants' National Bank* (139 Mass. 332), 710.

4. **Issue of stock below par.**] A railway company, being indebted to a construction company in the sum of $70,000, which it could not pay, issued to the members of the construction company, in satisfaction, certificates of its stock of the face value of $350,000. *Held*, that the receivers were liable, as stockholders, to creditors of the railway company, for the remaining eighty per cent of the par value. *Jackson* v. *Traer* (64 Iowa, 469), 449.

5. **Suit to compel issue of stock.**] An assignee of stock in a railroad company on which an installment remains unpaid by the original subscriber, may, upon properly tendering the same, with interest, maintain an action in equity to compel the company to issue to him a stock certificate. *Iron Railroad Company* v. *Fink* (41 Ohio St. 321), 84.

6. **Ultra vires — personal injury.**] A corporation chartered only as a railroad and banking company, although it has no authority to run a steamboat, is still liable to a passenger injured on a steamboat operated by it. *Central Railroad and Banking Company* v. *Smith* (76 Ala. 573), 358.

COVENANT.

See LANDLORD AND TENANT, 167.

CREDITORS' BILL.

See ACTION, 783; FRAUD, 662.

CRIMINAL LAW.

1. **Assault — intending one and injuring another.**] One who intending to kill A., assails B. in the dark, may be indicted for assault with intent to kill B. *McGehee* v. *State* (62 Miss. 772), 209.

2. **Cheating — other offenses.**] On a trial for obtaining property by trick and fraud, proof of other similar acts by the defendant, on the same day and at the same town, is admissible to show intent. *State* v. *Myers* (82 Mo. 558), 389.

3. **Evidence — corroborating accomplice — by wife.**] Where an accomplice is allowed to testify, he may be sufficiently corroborated by his wife. *Woods* v. *State* (76 Ala. 35), 314.

4. **Homicide — evidence of dangerous character of deceased.**] On a trial for murder, evidence of the dangerous character of the deceased is only admissible when a case of self-defense is shown, and then it must be proved by reputation and not by the opinions of witnesses. *Harrison* v. *Commonwealth* (79 Va. 374), 684.

5. **—— by negligence of physician.**] A physician, causing the death of a patient by wrapping him in cloths saturated in kerosene, may be found guilty of manslaughter. *Commonwealth* v. *Pierce* (138 Mass. 165), 264.

6. **—— of two at once — bar.**] Where two are murdered by the same act, conviction or acquittal as to one does not bar a prosecution to the other. *People* v. *Majors* (65 Cal. 138). 295.

7. **Rape — evidence of specific unchaste acts.**] On a trial for rape, evidence of specific unchaste conduct of the prosecutrix is inadmissible, whether sought to be proved by herself or others. *Shartzer* v. *State* (63 Md. 149), 501.

See JURISDICTION, 211.

DAMAGES.

1. **By fire by negligence — offset of insurance.**] Where buildings are burned through the negligence of another, the owner's recovery is not subject to diminution on account of insurance thereon. *Cunningham* v. *Evansville and Terre Haute Railroad Company* (102 Ind. 478.), 683.

2. **Carrier — loss of architect's plans.**] In an action against a carrier for the loss of an architect's plans for a house, there can be no recovery for the consequent delay in constructing the house, where the carrier had no notice of the nature or intended use of the contents of the package. *Mather* v. *American Express Company* (138 Mass. 55), 258.

3. **Proximate cause.**] Fire was negligently allowed to fall from a locomotive on defendant's elevated railroad upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse was frightened

DAMAGES — *Continued.*

and ran away. The driver attempting to drive him against the curbstone to stop him, the wagon passed over the curbstone and injured plaintiff, who was on the sidewalk. *Held*, that he might recover therefor. *Lowrey Manhattan Railway Company* (99 N. Y. 158), 12.

4. ——.] W. and C. quarrelled and fought, and W.'s son, without W.'s knowledge, interposed and cut C. so that he died. *Held*, that W. was not liable in damages. *White* v. *Conly* (14 Lea, 51), 154.

5. Remote — physician's negligence.] Where one has been personally injured by the negligence of another, without fault on his own part, and employs a reputable physician, his recovery of actual damages may not be diminished by the physician's mistake or neglect. *Loser* v. *Humphrey* (41 Ohio St. 378), 86.

Double.] *See* CONSTITUTIONAL LAW, 369.

See INTEREST, 478; RAILROAD, 462.

DECLARATIONS.

See INSURANCE, 227.

DEED.

1. Boundary — road — presumption.] Where a grant of land is bounded "on a road," the presumption that it conveys to the center may be rebutted by proof of the establishment of monuments, and fencing and occupancy in accordance therewith. *Dodd* v. *Witt* (139 Mass. 68), 700.

2. —— side of road.] A deed of a lot bounded by stones "on the side of a road," and answering the call for quantity without including the road, does not convey to the center of the road. *Peabody Heights Company* v. *Sadtler* (63 Md. 533), 519.

3. Condition — breach.] B. owned two hotels, in the same village, the Trotter House and the Bliss Hotel, and sold the former to the plaintiff for $4,250, and at the same time for the consideration of $2,500, agreed that the Bliss Hotel should never be used for hotel and boarding-house purposes; and as security, conveyed the Bliss hotel to the plaintiff by warranty deed, conditioned to be void if the restriction was observed. The plaintiff went out of the hotel business, and conveyed his hotel, but not his interest under the conditional deed. B. observing the condition so long as he was owner of the Bliss Hotel, finally sold it in parcels; and the several defendants became the owners. Large improvements had been made. There was a clear breach of the condition; but some of the defendants were innocent, and some not. In a suit for forfeiture, *Held*, that equity did not require an enforcement of the conditional deed; but that the plaintiff should recover the $2,500, with interest from the time he demanded the money. *Stevens* v. *Pillsbury* (57 Vt. 205), 121.

4. Delivery.] A deed of gift of real and personal property contained this clause: "This deed will be delivered to a friend for safe keeping, with directions to deliver at such time as I may direct." The directions accompanying it instructed the receiver to deliver it to the county recorder for

DEED — *Continued.*

registration on the grantor's death. *Held*, subordinate to a deed of gift delivered to other grantees, and accompanied by possession, although not recorded until after the former. *Davis* v. *Cross* (14 Lea, 637), 177.

5. **Implied easement of support.**] The plaintiff deeded land on which was a barn, by metes and bounds, to the defendant. The boundary line ran through the barn. The defendant cut off the part of the barn on his own land. *Held*, that he was liable for depriving the plaintiff of its support and shelter. *Adams* v. *Marshall* (138 Mass. 228), 271.

6. **"Present heirs."**] A deed in consideration of love and affection for the grantor's daughter and her "present heirs," and of $5, with *habendum* to the daughter "and her present heirs forever," does not vest fee in the daughter exclusively at common law. *Fountain County Coal and Mining Company* v. *Beckleheimer* (102 Ind. 76), 645.

7. **Recording — indexing.**] An index is not essential to the registration of a deed. *Stockwell* v. *McHenry* (107 Penn. St. 237), 475.

8. **Reservation — repugnancy.**] A warranty deed was conditioned for a reservation of all the grantor's right, title and interest for his life. *Held*, a valid reservation. *Graves* v. *Atwood* (52 Conn. 512), 610.

DELIVERY.

See DEED, 177; SALE, 177.

DEVISEE.

See WILL. 599; ADVERSE POSSESSION, 169.

DIVORCE.

See MARRIAGE.

DOWER.

See WILL, 599.

EASEMENT.

See DEED, 271.

EJECTMENT.

Against lawful owner in forcible possession.] One who having been in unlawful possession of lands has been forcibly dispossessed by the true owner cannot maintain ejectment to regain possession. *Moring* v. *Ables* (62 Miss. 268), 186.

ELECTION.

Ballots — intention of voters.] At an election concerning the issue of county bonds, it was prescribed that the voters in the affirmative should write or print on their ballots the words "for the bonds," and those opposed, "against the bonds." Certain ballots were cast on which had been printed, "for the bonds," but a pencil mark had been drawn through those words, and immediately underneath was written in pencil, "against." *Held*, that they should be counted in the negative. *Clark* v. *Board of Commissioners of Montgomery County* (33 Kans. 202), 526.

ESTOPPEL.

See PAYMENT, 219.

EVIDENCE.

1. **Altered instrument.**] Where there is an apparent material alteration in a written instrument, the question when the alteration was made is for the jury, and the instrument is primarily receivable in evidence. *Bank of Cass County* v. *Morrison* (17 Neb. 341), 417.

2. **Burden of proof.**] In civil actions the mere preponderance of evidence should prevail, although it involves the guilt of a felony. *Mead* v. *Husted* (52 Conn. 53), 554.

3. **Presumptions.**] In an action for the burning of the plaintiff's barns the judge instructed the jury, that "if upon the whole testimony, after giving the defendant the benefit of the presumption in his favor, they fairly and honestly believed that it was more likely to be true that the defendant set fire to the plaintiff's barns than that he did not, they ought to render a verdict for the plaintiff, and if they did not so believe, then for the defendant." *Held*, no error. *Id.*

4. **Expert — insanity.**] A physician not an expert on the subject of insanity may testify as to the mental condition of a patient when he has had adequate opportunity to form an opinion, but cannot qualify himself to testify by a single examination. *Inhabitants of Fayette* v. *Inhabitants of Chesterville* (77 Me. 28), 741.

5. **Memoranda — copies.**] Where a railroad freight agent is required to testify as to the quantity of certain freight, and the times of receiving it, and testifies that he has no knowledge except that obtained from the way bills in the office, he may testify from copies of such way bills made by himself. *Erie Preserving Company* v. *Miller* (52 Conn. 444), 607.

6. **Non-expert opinions — health.**] Non-expert opinions as to the health and physical condition of another, based upon personal knowledge, are competent. *Carthage Turnpike Company* v. *Andrews* (102 Ind. 138), 653.

7. **Of good character.**] In a civil action where a sale is attacked for fraud, evidence of the good character of the purchaser is incompetent. *Liebkauf* v. *Brinker* (62 Miss. 255), 183.

8. **Usage — to explain insurance.**] In an action on a policy of fire insurance on a junk-dealer's stock of "rags" and "old metals," evidence is competent to show that by usage in that trade "rags" includes all articles used in the manufacture of paper, and "old metals" includes such articles as old rubber and old glass. *Mooney* v. *Howard Insurance Company* (138 Mass. 375), 277.

9. **Corroborating accomplice.**] *See* CRIMINAL LAW, 314.

See INSURANCE, 227; MARRIAGE, 613; NEGLIGENCE, 744.

EXCISE.

See CONSTITUTIONAL LAW, 90.

EXECUTOR AND ADMINISTRATOR.

1. **Conflict of laws — foreign letters.**] Where a resident of Alabama procured a policy of insurance on his life, through an agent residing and acting for it there, from a company chartered in New York, and died in Alabama, his executor appointed in Alabama may maintain an action on it there, although administration had also been granted in New York. *Equitable Life Assurance Society* v. *Vogel's Executrix* (76 Ala. 441), 844.

2. **Foreign — suit on claim assigned by.**] An action will lie in Iowa on a claim assigned to the plaintiff by a foreign executor, although there has been no probate or administration in Iowa. *Campbell* v. *Brown* (64 Iowa, 425), 446.

3. **Foreign — action for death by negligence.**] An administrator appointed in another State cannot maintain an action in Kansas for the negligent killing of his intestate where he cannot maintain such an action under the law of the State of his appointment. *Limekiller* v. *Hannibal and St. Joseph Railroad Company* (33 Kans. 83), 523.

4. **Liability for gravestone — statute.**] No action lies against an administrator for the cost of a monument to the intestate, erected at the request of the widow, and against the wish of the administrator, although the statute authorizes the Probate Court, on the settlement of an estate, to allow a reasonable sum for a monument. *Sweeney* v. *Muldoon* (139 Mass. 304), 708.

5. **Special promise to answer from his own estate.**] The promise of an executor to pay an heir at law money to desist from opposition to the will is on sufficient consideration, and is not within the statute prohibiting an action "upon a special promise of an executor or administrator to answer damages out of his own estate." *Bellows* v. *Sowles* (57 Vt. 164), 118.

EXEMPTION.

See PENSION, 789.

FENCES.

See FIXTURES, 529.

FIXTURES.

1 **Fence — license to remove.**] A fence built by one upon the land of another, under a parol agreement that the builder might remove it at will, passes with a grant of the land to a purchaser in good faith without notice of the agreement. *Rowand* v. *Anderson* (33 Kans. 264), 529.

2. **Of trade — right of removal.**] As between landlord and tenant, engines and boilers erected by the tenant on brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches; and dwellings erected by him for his employees, standing on posts or dry stone walls piled together, all intended to be merely accessory to the tenancy, and without intention to make them permanent, and capable of removal without material disturbance to the land, are trade fixtures, removable at or before the termination of the lease. *Conrad* v. *Saginaw Mining Company* (54 Mich. 249), 817.

FRAUD.

1. **Director's representation of solvency of bank.**] In an action against a director of a bank for falsely representing the bank to be solvent, by means whereof the plaintiff was induced to buy stock and make deposits, it must appear that the defendant knew his representation to be false, or that the fact not being within his knowledge he falsely represented it as of his own knowledge. *Cole* v. *Cassidy* (138 Mass. 437), 284.

2. **Impeaching fraudulent transfer by non-resident — necessity for judgment.**] A judgment setting aside a fraudulent transfer of corporate stock by a non-resident may be rendered upon constructive service of process, and it is not essential that the creditor should first obtain judgment on his demand. *Quarl* v. *Abbett* (102 Ind. 233), 662.

3. **Obtaining property by promise to marry — public policy.**] A woman fraudulently, and without intending to fulfill her promise, by false professions of love, and by false pretenses of wealth and by a promise to marry the plaintiff, and by the pretense that it was necessary to silence the opposition of her children, induced the plaintiff to convey land to her, with the further agreement that after the marriage she would convey it to a certain other person. The man was already married at the time of the agreement, but had procured a divorce before the execution of the deed. *Held*, that the deed should be set aside. *Douthitt* v. *Applegate* (33 Kans. 395), 533.

See BANK, 9; RAILROAD, 431.

GIFT.

1. **Savings bank deposit.**] Alden Burton at his death left two savings bank deposit books, one in his own name, the other in that of "James Burton" (his son) "order of Alden Burton." On the last page of each was an order, signed by him, to pay the deposit to James, that in the former book being absolute, that in the other book directing the payment to be made at his death. Deposits and drafts were made after the dates of the orders. Neither of the books was delivered to James, and he had no knowledge of them. *Held*, not a valid gift. *Burton* v. *Bridgeport Savings Bank* (52 Conn. 398), 602.

2. ——.] At the direction of her aunt four days before her death, the plaintiff took the aunt's savings bank book, and the aunt said: "Keep this, and if any thing happens to me, bury me decently and put a head-stone over me, and pay my debts, and any thing that is left is yours." *Held*, a valid gift *causa mortis*, coupled with the trust. *Curtis* v. *Portland Savings Bank* (77 Me. 151), 750.

GOOD WILL.

See TRADE MARK, 811.

GUARDIAN AND WARD.

Conversion of personalty into realty.] A guardian may not convert his ward's personal estate into real estate without the previous sanction of the court, and the vendor may not enforce a lien. *Boisseau* v. *Boisseau* (79 Va. 73), 616.

See MARRIAGE, 539.

HIGHWAY.

See ADVERSE POSSESSION, 308; INJUNCTION, 579.

HOMICIDE.

See CRIMINAL LAW, 634.

HUSBAND AND WIFE.

See MARRIAGE; INSURANCE, 794.

INJUNCTION.

1. **Against interference with lateral support.**] The right to lateral support of soil will be protected by injunction, although the pecuniary damage threatened is slight, and may be easily compensated in damages. *Trowbridge* v. *True* (52 Conn. 190), 579.

2. **Obstruction to highway.**] Where one unlawfully puts a fence across a town highway and threatens to maintain it, he may be prohibited by injunction at the suit of the town. *Town of Burlington* v. *Schwarzman* (52 Conn. 181), 571.

See NUISANCE, 22; WATER AND WATER-COURSE, 768.

INNKEEPER.

Liability for guest's goods.] An innkeeper is liable for the safe-keeping of the valise and box of a peddler, his guest, although he was not notified of the nature and value of their contents, and the peddler was too drunk to take proper care of it. *Rubenstein* v. *Cruikshanks* (54 Mich. 199), 806.

INSANITY.

See EVIDENCE, 741; MARRIAGE, 589; WILL, 822.

INSURANCE.

1. **Change of title — sale by one partner to another.**] Where partnership property is insured against fire to the firm, a sale by one of the firm to the other partners is a "change of title," avoiding the policy. *Hathaway* v. *State Insurance Company* (64 Iowa, 229), 438.

2. **Life — declarations of insured.**] Declarations of one whose life is insured for the benefit of others, tending to contradict statements in his application and avoid the policy, are inadmissible. *Schwarzbach* v. *Ohio Valley Protective Union* (25 W. Va. 622), 227.

3. **—— warranties.**] An application for life insurance warranted that the answers therein were correct and true, and declared that if any of them should be in any material respect untrue or false, or tend to deceive the insurer, the contract should be void. *Held*, a mere representation, a breach of which was not fatal unless fraudulently false. *Id.*

4. **—— assignment.**] A policy of life insurance issued to one having an insurable interest may be assigned to another having no interest. *Mutual Life Insurance Company* v. *Allen* (138 Mass. 24), 245.

INSURANCE — *Continued.*

5. **Life interest—assignment.**] A policy of insurance issued to one on his own life may not be assigned by him to another having no interest in his life, and an assignment as collateral is void beyond the amount of the debt. *Helmetag's Administrator* v. *Miller* (76 Ala. 183), 316.

6. **——interest—husband in wife's life.**] It is presumed *prima facie* that the husband has an insurable interest in his wife's life. *Currier* v. *Continental Life Insurance Company* (57 Vt. 496), 134.

7. **—— for wife—payment by husband.**] Under the statute allowing wives to insure their husband's lives for their exclusive benefit, a policy is valid although taken out and kept up by the husband without the wife's knowledge. *Felrath* v. *Schonfield* (76 Ala. 199), 319.

8. **Subrogation of carrier.**] In the absence of express provision to the contrary the owner of goods in transit may give the carrier the benefit of his insurance, and this does not avoid the policy as a sale, assignment, transfer or pledge of interest. *Jackson Company* v. *Boylston Mutual Insurance Company* (139 Mass. 508), 728.

See DAMAGES, 683; EVIDENCE, 277.

INTEREST.

On unliquidated damages.] In an action of damages for destruction of property by negligence, interest on the damages from the time of destruction is allowable. *City of Allegheny* v. *Campbell* (107 Penn. St. 533), 478.

See INSURANCE, 816; NEGOTIABLE INSTRUMENT, 190.

JUDGMENT.

See CONSTITUTIONAL LAW, 751.

JURISDICTION.

Offense on vessel in river.] The State of West Virginia has jurisdiction of a criminal offense committed on a vessel on the Ohio river, within low-water mark, opposite the territory of West Virginia, although moored to the bank within the boundaries of the State of Ohio. *State* v. *Plants* (25 W. Va. 119), 211.

LAKE.

Bay on great.] *See* WATER AND WATER-COURSE, 71.

LANDLORD AND TENANT.

1. **Abandonment of premises.**] Where a tenant merely removes from the leased premises during his term, the landlord is not authorized to re-enter and put another tenant in possession, and the first tenant may recover the possession. *Chancey* v. *Smith* (25 W. Va. 404), 217.

2. **Appurtenances.**] On a lease of hotel property, a kettle, situated on the lessor's adjacent lot, and used by him in connection with the hotel, does not pass as appurtenant, when not indispensable to the enjoyment of the hotel. *Barrett* v. *Bell* (82 Mo. 110), 361.

LANDLORD AND TENANT — *Continued.*

3. **Assignment of lease — covenants.**] The assignee of a lease is subject to a covenant therein to pay taxes, and a subsequent assignment by him will not relieve him from liability for a breach occurring during his possession. *State* v. *Martin* (14 Lea, 92), 167.

4. **Destruction of premises.**] The lessee of a room in a block covenanted to keep the premises in good repair, but if the premises were destroyed, the lease was to become void. A building was thereafter erected on an adjoining lot by third persons, whereby the demised premises were, to a great extent, cut off from light and ventilation, and rendered damp and unhealthy, but were capable of being made tenantable by repairs. *Held*, that the lessee was not authorized to abandon the lease and refuse payment of rent, either under the contract, or under a statute providing that where leased buildings shall be destroyed, or be so injured by the elements or any other cause, as to be unfit for occupancy, the liability for rent shall cease. *Hillard* v. *New York and Cleveland Gas Coal Company* (44 Ohio St. 662), 99.

5. **Peaceable re-entry — forcible withholding.**] A landlord, entitled to re-possession, may not re-enter during the tenant's temporary absence, without legal warrant, and hold forcible possession. *Mason* v. *Hawes* (52 Conn. 12), 552.

See FIXTURES, 817; NEGLIGENCE, 286.

LEASE.

See AGENCY, 680; LANDLORD AND TENANT; WILL, 505.

LEGACY.

See WILL, 149.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

LICENSE.

See STATUTE OF FRAUDS, 698.

LOAN.

See BAILMENT, 657.

MAILS.

See CARRIER, 334.

MALICIOUS PROSECUTION.

When lies.] An action of malicious prosecution does not lie unless there has been arrest of person or seizure of property. *Wetmore* v. *Mellinger* (64 Iowa, 741), 465.

MANDAMUS.

To exhibit records.] Mandamus lies to compel a custodian of excise bonds to allow a citizen interested in inspecting them to have access to them. *Brown* v. *County Treasurer* (54 Mich. 132), 800.

See TELEGRAPHS, 404.

MARRIAGE.

1. **Contract of marriage insurance — when void.**] Under the charter of the defendant, a private corporation, organized "to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed $6,000, to be paid at marriage or endowment, according to the regulations adopted;" a certificate of membership providing, "that no member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate," and that "every member who shall have been in good standing, for at least three months prior to his marriage, shall be entitled to $40 per month upon each $1,000 named in his certificate, for each whole month of his membership, provided that the same shall never exceed $3,000, or so much thereof as shall be realized from one marriage assessment of all the members of this class," and procured for the benefit of a third person, not related to the member, but who was to pay the dues and assessments, and to receive two-thirds of the proceeds when collected, is void as in restraint of marriage, and as a wager policy of insurance. *White* v. *Equitable Nuptial Benefit Union* (76 Ala. 251), 325.

2. **Divorce — action by guardian of insane party.**] The guardian of an insane woman may not maintain an action against her husband for divorce or alimony. *Birdzell* v. *Birdzell* (33 Kans. 433), 539.

3. —— **alimony — husband's death.**] Where alimony is decreed in terms for the natural life of the wife, it subsists even after the defendant's death. *Stratton* v. *Stratton* (77 Me. 373), 779.

4. —— **"extreme cruelty."**] *Avery* v. *Avery* (33 Kans. 1), 523.

5. **Evidence — of unlawful cohabitation.**] A formal marriage being proved, evidence that the cohabitation was reputed to be unlawful is incompetent. *Northrop* v. *Knowles* (52 Conn. 522), 618.

6. **Husband's action for conversion of wife's property.**] A husband cannot maintain an action for conversion of his wife's separate property. *Hackett* v. *Hewitt* (57 Vt. 442), 132.

See CRIMINAL LAW, 314; FRAUD, 533; INSURANCE, 319; SEDUCTION, 385; WILL, 255.

MASSES.

For repose of souls.] *See* CONTRACT, 41.

MASTER AND SERVANT.

1. **Contractor.**] One who contracts with a furnace company to dig sand on its land and draw it to its furnace at a fixed price per load, there being no provision as to the manner of the performance of the work, is not a servant for whose negligence the company is liable. *Fink* v. *Missouri Furnace Company* (82 Mo. 276), 376.

2. —— **nuisance.**] When the plaintiff was driving on a highway his horse became frightened at a steam shovel in use on the defendant's lands near the road, and ran away, and the plaintiff was hurt. The shovel was operated and controlled by an independent contractor, although the defendant

contemplated its use when the contract was made. *Held*, that the defendant was not liable. *Bailey* v. *Troy and Boston Railroad Company* (57 Vt. 252), 129.

3. **Contributory negligence — consenting to more hazardous employment.**] A servant of mature age and intelligence being required by the master to perform duties not embraced in the original hiring, and more dangerous, and undertaking the same through fear of losing his place, but knowing the increased hazard, has no remedy against the master if he is injured by reason of his ignorance or inexperience. *Leary* v. *Boston and Albany Railroad* (139 Mass. 580), 733.

4. **Course of employment.**] A railway section foreman, returning from work with his crew on a hand-car, and meeting a train, transferred the car to a parallel track operated by another company, as had previously been done occasionally, but without the knowledge of either company, and on that track his car was negligently run against a car containing section men of that road, whereby one of the men was injured. *Held*, that the foreman's employers were liable. *Pittsburgh, Cincinnati and St. Louis Railway Company* v. *Kirk* (102 Ind. 399), 675.

5. **Engineer running train for contractor.**] A railroad company let certain work to a contractor, furnishing him a construction train with an engineer to run it. Except in respect to speed and side-tracking for other trains, the train was under the control of the contractor. The company was bound to discharge the engineer on the contractor's complaint; otherwise the company controlled him; and it paid his wages, but deducted them from the amount due the contractor. *Held*, that the engineer was the servant of the company. *New Orleans, etc., Railroad Company* v. *Norwood* (62 Miss. 565), 191.

6. **Fellow-servants — railroad employees.**] A gang of track-repairers on a railroad quit work fifteen minutes before the usual hour, by order of the foreman, to take a train for a certain station, whither they were to be carried free, according to a monthly custom, to be paid off. The plaintiff in endeavoring to board the train was injured by a hand-car worked by other men in the company's employment. *Held*, that he could not recover therefor. *O'Brien* v. *Boston and Albany Railroad Company* (138 Mass. 387), 279.

7. **—— train-dispatcher and engineer.**] A railway train-dispatcher and a locomotive engineer are not fellow-servants. *Darrigan* v. *New York and New England Railroad Company* (52 Conn. 285), 590.

MECHANICS' LIEN.

On railroad bridge.] A mechanics' lien will attach to a railroad bridge. *Smith Bridge Company* v. *Bowman* (41 Ohio St. 37), 67.

MUNICIPAL CORPORATION.

1. **Change of street grade.**] Under a constitutional provision that private property shall not be damaged for public use without just compensation, a city is liable to a lot-owner for injury by raising the street grade. *Harmon* v. *Omaha* (17 Neb. 548) 420.

MUNICIPAL CORPORATION — *Continued.*

2. **Illegal action to abate nuisance — liability therefor.**] In the absence of statutory authority a city may not erect a dam on a person's land without his consent, to abate a nuisance on other land, and such action being unauthorized, the city is not liable for injury caused thereby. *Cavanagh* v. *Boston* (139 Mass. 426), 716.

3. **Liability for nuisance.**] A town is liable in damages for maintaining a market house which is a nuisance. *Town of Suffolk* v. *Parker* (79 Va. 660), 640.

4. **Negligence — barrier on highway.**] A town is not bound to erect a barrier on a highway to protect travellers from falling over a dangerous bank thirty-four feet distant from the travelled part, and nine and a half feet from the line of the highway as located. *Barnes* v. *Chicopee* (138 Mass. 67) 259.

5. **—— sewer.**] A city ordered certain privy inlets connecting with a sewer to be closed on account of the stench. In doing this the workmen closed an inlet from the plaintiff's house, not connected with a privy, and caused the water to flow back on her premises. *Held*, that the city was liable. *Semple* v. *Vicksburg* (62 Miss. 63), 181.

6. **Taking property for pest-house.**] A city has no authority to seize property outside its limits for a pest-house without consent of the owner. *Dooley* v. *City of Kansas* (82 Mo. 444), 380.

NEGLIGENCE.

1. **Contributory — being on railroad track.**] It is not necessarily negligent for one to be upon a railroad track where he has no right to be, and he may recover for an injury by the negligence of the company in running at an unlawful rate of speed if he himself was not otherwise negligent. *Vicksburg and Meridian Railroad Company* v. *McGowan* (62 Miss. 682), 205.

2. **Diseased animals.**] By a railway accident a large number of swine were loosed. The defendant, the manager of the road, directed his servants to collect them and put them in a safe place. They put them in the plaintiff's barnyard in his absence and without his leave, but on his return he did not object, but assisted in feeding them, and also in taking them away for reshipment, and rendered a bill for food, services and damage to grass. The swine were diseased and infected the plaintiff's swine, but neither he nor the defendant knew of the disease. *Held*, that the defendant having acted within his authority was not liable. *Hawks* v. *Locke* (139 Mass. 205), 702.

3. **Evidence — presumption as to contributory — railroad crossing.**] In an action for death of a traveller on a highway at a railway crossing, there is no presumption that he used due care, and evidence as to his character and habits of carefulness is incompetent. *Chase* v. *Maine Central Railroad Company* (77 Me. 62), 744.

4. **Landlord and tenant — tenant burning premises.**] A tenant of part of a building, the other part of which is occupied by his landlord, and in both

parts of which there are chattels of the landlord, is liable for the accidental destruction of the landlord's part and its contents by fire caused by his negligence in heating his own part; but he is not liable for the destruction of his own part unless he was recklessly negligent; and as to the landlord's chattels in his own part it depends upon the nature of the bailment. *Lothrop* v. *Thayer* (138 Mass. 466), 286.

5. **Proximate cause.**] A railway passenger was carried a little past the station of his destination on a dark night, and on leaving the train was misinformed by the conductor as to where he was, but being acquainted with the neighborhood he soon discovered the mistake. If he had got off where he was told he had, it was his intention to follow the track, and cross a culvert, although he might have avoided it, but he pursued his way intending to cross another culvert. He fell into this and was hurt. *Held*, that the company's negligence was not the proximate cause of the injury. *Lewis* v. *Flint and Pere Marquette Railroad Company* (54 Mich. 55), 790.

6. ——.] The defendant unlawfully obstructed a street by a train of cars. The plaintiff desiring to pass walked around the rear of the train, entered another street, obstructed by ice placed there by the defendant in clearing its track, which was laid also in that street, fell upon the ice and was injured. There were other available routes to her destination. *Held*, that the injury was the proximate result of the ice. *Railway Company* v. *Staley* (41 Ohio St. 118), 74.

7. **Public caterer — unwholesome food.**] A public caterer, employed to furnish refreshments at a public ball, is liable for an injury suffered by one attending, by reason of unwholesome provisions furnished by him. *Bishop* v. *Weber* (139 Mass 411), 715.

Of physician.] *See* CRIMINAL LAW, 271.

See ABATEMENT, 25; EXECUTOR AND ADMINISTRATOR, 523; DAMAGES, 12, 86; MASTER AND SERVANT, 783; MUNICIPAL CORPORATION, 181, 259; RAILROAD, 431, 468.

NEGOTIABLE INSTRUMENT.

1. **"Interest after maturity."**] A promissory note payable on a certain day with "interest after maturity" draws interest from that day and not from the third day of grace. *Wheeless* v. *Williams* (62 Miss. 369), 190.

2. **Notice of equities.**] The guardian of L., an insane person, pledged negotiable bonds belonging to his ward as collateral security for his own debt, representing that they were his own. The bonds however were indorsed with an assignment by a former holder to L. *Held*, that the transferee was put upon inquiry and subject to equities. *Langdon* v. *Baxter National Bank* (57 Vt. 1) 113.

NOTES.

Action for alienating wife's affection, 888.

Constitutional law — Double Damage Act, 375.

Corporation — *ultra vires* — personal injury, 858.

Damages — proximate cause, 157.

NOTES — *Continued.*

Executor — foreign — action on assigned claim, 448.

Fraud — creditor's bill — necessity of judgment, 678.

Injunction — against interference with lateral support, 581.

—— obstruction to highway, 574.

Insurance — "change of title" — sale between partners, 442.

—— interest in life, 135.

Landlord and tenant — appurtenances, 364.

Master and servants — who are fellow-servants, 280.

—— consenting to more hazardous employment, 787.

Municipal corporation — liability for nuisance, 648.

Negligence being on railroad track, 208.

Railroad — fraudulent conduct of passengers, 434.

Sale — with privilege of return, 586.

Statute — "manufacturer," 107.

—— "merchant," 761.

—— prohibiting physician from testifying, 4.

Statute of limitations — payment of dividends by assignee, 401.

NOTICE.

See CORPORATION, 710; NEGOTIABLE INSTRUMENT, 118.

NUISANCE.

1. **Injunction — illegal business.**] The sale of adulterated teas will not be restrained by injunction, unless it appears to threaten serious danger to human life or serious detriment to health. *Health Department of the City of New York* v. *Purdon* (99 N. Y. 237), 22.

2. **Invasion of well by roots.**] Where the roots of a tree run into and pollute a well on the lands of an adjoining owner, the latter may have an action for the damage, after refusal of the owner of the tree to abate the nuisance. *Buckingham* v. *Elliott* (62 Miss. 296), 188.

See CONSTITUTIONAL LAW, 173; MASTER AND SERVANT, 129; MUNICIPAL CORPORATION, 640, 716.

OFFICE.

See CONSTITUTIONAL LAW, 687.

PARTNERSHIP.

See INSURANCE, 438; WILL, 510.

PATENTS.

See CONSTITUTIONAL LAW, 695; TRADE-MARK, 74.

PAYMENT.

Voluntary — recovery.] Where the defendant in a suit, with full knowledge of the facts, voluntarily pays part of the demand, and judgment is rendered against him for the balance, which is conclusively reversed on appeal, he cannot recover the part so paid. *Beard* v. *Beard* (25 W. Va. 486), 219.

PENSION.

Exemption from creditors.] Pension money is not exempt from claims of creditors after it actually comes into the hands of the pensioner. *Friend* v. *Garcelon* (77 Me. 25), 739.

PEST HOUSE.

See MUNICIPAL CORPORATION, 880.

PHYSICIAN.

Prohibition of testimony.] *See* STATUTE, 1.

See CRIMINAL LAW, 264; DAMAGES, 86.

PLEDGE.

Equitable.] For the purpose of borrowing money from B., to form a limited partnership, A. executed an instrument pledging to B. all his interest in the limited partnership of A. to C., A. to remain in possession, but to make an assignment of his interest on demand. The proposed partnership was formed, but under another name, including additional parties. B. lent the money to A., who contributed it to the capital of the partnership. No assignment was ever made nor demanded. A. died insolvent, but upon the subsequent winding up of the partnership a balance of profits remained, and A.'s share thereof was paid to his executor. Upon distribution of said fund, *held*, that B. was entitled to receive the amount of the pledge to the exclusion of a general creditor of A. *Collins' Appeal* (107 Penn. St. 590), 429.

PRESCRIPTION.

See WAY, 513.

PRESUMPTION.

Of insanity.] *See* WILL, 322.

See RAILROAD, 468; TRESPASS, 473.

PRINCIPAL AND AGENT.

See BANK, 94.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT.

PROXIMATE CAUSE.

See DAMAGES, 12, 86, 154; NEGLIGENCE, 74, 790; RAILROAD, 587.

PUBLIC POLICY.

See CONTRACT.

RAILROAD.

1. Communication of fire — proximate cause.] Fire caught from the sparks of the defendant's locomotive on the land of D. The defendant's servants were successfully extinguishing it when D. desired them to desist, as he wished to have it burn up the bogs. They desisted, but it communicated to and injured the plaintiff's adjoining land. *Held*, that the defendant

RAILROAD — *Continued.*

was liable under the statute. *Simmonds* v. *N. Y. & N. E. R. Co.* (52 Conn. 264), 587.

2. **Duty to furnish stations.**] A railroad company may be compelled to furnish and maintain stations for passengers and freight at all proper points on its line. *State* v. *Republican Valley R. Co.* (17 Neb. 647), 424.

3. **In street — duty as to snow.**] In clearing the snow from its track a street railway company is bound to dispose of it so as not to interfere unnecessarily with the safety and convenience of persons using the street, and in case of extraordinary snow-falls must use extraordinary efforts to that end. *Bowen* v. *Detroit City Railway* (54 Mich. 496), 822.

4. **Negligence — contributory — presumption.**] In action for a fatal injury at a street and a railway crossing, it appeared that the deceased was approaching the crossing in a wagon, that the crossing was at an acute angle, and the view was so obstructed by trees and corn that a train could not be seen beyond ten yards from the track and then for only fifty yards. The train was moving forty miles an hour without giving warning. It did not appear that the deceased stopped or looked and listened. *Held*, that a nonsuit for contributory negligence was improper. *Schum* v. *Penn. R. Co.* (107 Penn. St. 8), 468.

5. **—— fraudulent use of another's ticket.**] One who is injured by the negligence of a railway company while travelling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company. *Way* v. *Chi., R. I. & Pac. R. Co.* (64 Iowa, 48), 431.

6. **"Passenger" — boarding moving train.**] The plaintiff's intestate having been riding on the engine, got off at a station where the train stopped, and ran to get into a car, but did not reach it till the train had started, and then stood on the platform until he fell off, owing to the swaying of the train, and was killed. *Held*, that he had not become a "passenger" within the statute, and the railroad company was not liable. *Merrill* v. *Eastern R Co.* (139 Mass. 238), 705.

7. **Power of State to supervise.**] Even where the charter of a railroad company gives it the right to regulate its charges, the State may create a commission with the power to see that it keeps within its charter limits, to prevent unjust discrimination, and to enforce such reasonable regulations as the State may deem necessary. *Stone* v. *Yazoo & Miss. Val. R. Co.* (62 Miss. 607), 193.

8. **Ticket for station at which train does not stop — right to ride to intermediate station.**] A railway passenger, with a ticket for a station at which the train does not stop, has the right to ride to an intermediate station at which it does stop. *Richmond, F. & P. R. Co.* v. *Ashby* (79 Va. 130), 620.

9. **Track in street — damages — "abutting owners."**] Owners of lots abutting upon streets only crossed by a railway are not entitled to damages for construction. *Morgan* v. *Des Moines & St. L. Ry. Co.* (64 Iowa, 589), 462.

See CARRIER, 349, 460; MASTER AND SERVANT, 279, 590, 675, NEGLIGENCE, 205, 744.

RAPE.

See CRIMINAL LAW, 501.

RECORDING.

See DEED, 475.

RECORDS.

See MANDAMUS, 800.

REMAINDER.

See WILL, 781.

RESERVATION.

See DEED, 610.

SALE.

1. **Illegal — of liquors in another State.**] A sale of intoxicating liquors in Missouri, to be sold in Kansas contrary to the law of that State, may be enforced in Kansas, although the seller knew the illegal purpose of the buyer, provided he did not engage actively to promote or share in it. *Feineman* v. *Sachs* (33 Kans. 621), 547.

2. **Warranty — retaining article.**] Where goods are sold with warranty of quality, the purchaser on discovering a breach is not bound to rescind, but may use the goods and rely on the warranty. *Brigg* v. *Hilton* (95 N. Y. 517), 68.

3. **With privilege of return of a part.**] Where goods are sold and delivered on a written order, what is used to be accounted for and the balance returned, title to the whole passes on delivery, and parol evidence of a contrary understanding is inadmissible. *Hotchkiss* v. *Higgins* (52 Conn. 205), 582.

See CONTRACT, 383; STATUTE OF FRAUDS, VENDOR AND PURCHASER.

SCHOOLS.

See CONSTITUTIONAL LAW, 444.

SEDUCTION.

Action for alienating wife's affections.] An action for alienating a wife's affections may be maintained without proof of debauchery or enticing her away. *Rinehart* v. *Bills* (82 Mo. 534), 885.

STATE.

Power to supervise railroads.] *See* RAILROADS, 193.

See JURISDICTION, 211.

STATUTE.

1. **"Business or vocation."**] The statute prohibiting the employment of any young child in "playing on musical instruments, rope or wire-walking, dancing, begging or peddling, or as a gymnast, rider, contortionist or acro-

STATUTE — *Continued.*

bat," or "in any business, exhibition or vocation injurious to the health or dangerous to the life or limb," etc., does not apply to the employment of a child in a steam laundry, where there is dangerous machinery. *Hickey* v. *Taaffee* (99 N. Y. 204), 19.

2. **"Debt" — claim in tort.**] A claim in tort, not in judgment, is not a "debt" within the meaning of the statute as to foreign attachment. *Holcomb* v. *Town of Winchester* (52 Conn. 447), 608.

3. **"Manufacturer."**] A pork packer is a "manufacturer." *Engle* v. *Sohn* (41 Ohio St. 691), 103.

4. **"Merchant or trader" — dealing in stocks.**] An occasional dealing in stocks, outside one's ordinary business, does not constitute him a "merchant or trader" within the insolvent law. *Ex parte Conant. In re Fogler* (77 Me. 275), 759.

5. **"Person" — prematurely born child.**] Where a woman, four or five months pregnant, fell on a defective highway, and was delivered of the child which survived but a few minutes, the child was not a "person" within the statute giving a cause of action for negligent death to the administrator. *Dietrich* v. *Northampton* (138 Mass. 14), 242.

6. **Prohibition of physician's testifying — waiver—death of party.**] Where a statute prohibits a physician from testifying to information acquired by him while attending a patient unless the patient waives the privilege, the death of the patient makes the prohibition conclusive. *Westover* v. *Ætna Life Insurance Company* (99 N. Y. 56) 1.

Oleomargarine.] *See* CONSTITUTIONAL LAW, 34.

See WILL, 255.

STATUTE OF FRAUDS.

1. **License—occupancy of hall.** An oral agreement to let a public hall for four specified days at a certain price for each day, is not a sale of an interest in land, and not within the statute of frauds. *Johnson* v. *Wilkinson* (139 Mass. 3), 698.

2. **Sale of land — within year.**] The defendant orally agreed with a mortgagor of lands to purchase the mortgage, sell the mortgaged property, satisfy the mortgage, and pay him the balance. *Held*, not within the statute of frauds. *McGinnis* v. *Cook* (57 Vt. 36), 115.

3. **Time and place of delivery.**] Under the statute of frauds, a contract for the sale of goods need not specify time or place of delivery; but if plaintiff testifies that time or place was agreed upon, and the contract does not specify it, he cannot recover on it. *Smith* v. *Shell* (82 Mo. 215), 365.

STATUTE OF LIMITATIONS.

Payment by assignee.] The payment of a dividend by the assignee of an insolvent debtor will not take the debt out of the statute of limitations as against the debtor. *Whitney* v. *Chambers* (17 Neb. 70), 398.

See ACTION, 783.

STOCK.

Suit to compel issue of.] *See* CORPORATION, 84.

See CORPORATION, 449.

STREET.

See ADVERSE POSSESSION, 308.

STREET RAILWAY.

See RAILROAD, 822.

SUBROGATION.

See INSURANCE, 728; WILL, 149.

SUNDAY.

Contract — "necessity."] The note in suit was executed on Sunday plaintiff, who was travelling, and wished to pursue his journey on day. He had been at the place of its execution for two days, and no son was shown for its not having been executed before. *Held*, not "case of necessity" which would render the contract valid. *Burns* *Moore* (76 Ala. 339), 332.

SUPPORT.

Of land.] *See* DEED, 271.

SURFACE WATER.

See WATER AND WATER-COURSE, 881.

TAXATION.

See CONSTITUTIONAL LAW, 305.

TELEGRAPHS.

Telephone company — duty to serve all.] A telephone company may not arbitrarily refuse its facilities to any person desiring them and offering compliance with its regulations, and *mandamus* will issue to compel the company to do its duty *State* v. *Nebraska Telephone Company* (17 Neb. 126), 404.

TELEPHONE COMPANY.

See TELEGRAPHS, 404.

TORT.

Assisting escape of thief.] A railway conductor permitting a passenger to travel on his train with goods which the conductor knows to have been stolen, and thus escape, is not liable to the owner, where he did not know that the passenger was the thief nor that the plaintiff was the owner. *Randlette* v. *Judkins* (77 Me. 114), 747.

TOWN.

See CONSTITUTIONAL LAW, 751.

TRADE-MARK.

1. **Infringement—sale of good-will.**] Three parties had carried on business at Kalamazoo under the name of Kalamazoo Wagon Company. Two of them sold out their entire interest, including the good-will, to the plaintiff, and afterward set up a like business, almost next door, under the name of Kalamazoo Buggy Company, issuing circulars and cards in that name, resembling those of the plaintiff. *Held*, that such use of that name should be restrained, but that the defendants should not be prohibited from receiving mail matter addressed in their said name. *Myers* v. *Kalamazoo Buggy Company* (54 Mich. 215), 811.

2. **Patent—expiration.**] Where a patented machine becomes known to the public by a distinctive name, and by its shape, appearance and ornamentation, any one after the expiration of the patent can make and sell it and use the name, and no one can deprive him of that right by incorporating the name into a trade-mark. *Brill* v. *Singer Manufacturing Company* (41 Ohio St. 127), 74.

TREES.

See NUISANCE, 188.

TRESPASS.

Presumption of ownership of timber.] A., the tenant of timber land of B., cut timber on that land and also on adjoining land belonging to others, and sold it to C. B. replevied the timber and converted it to his own use. In trover by C. against B. therefor, *held*, that the *prima facie* presumption was that A. had the right to cut the timber on the adjoining property. *Winlack* v. *Geist* (107 Penn. St. 297), 478.

TRUST.

Following misapplied fund.] N. put $469 into the hands of W. in trust. W. deposited it in bank with other moneys to his own credit, and afterward drew out and applied to his own use all but $91. Subsequently he drew checks for that balance, and some $1,400 in another bank, in favor of R., to secure him against his liability for W., on an official bond. *Held*, that N. could not recover his money from R. *Neely* v. *Rood* (54 Mich. 134), 802.

See ACTION, 783; WILL, 510.

USAGE.

See EVIDENCE, 277.

VENDOR AND PURCHASER.

"Agreement to be void"—enforcement.] Where an agreement for the sale of land is conditioned to be void if the vendee shall fail to fulfill, and the vendee so fails, the vendor may treat it as void or as in force. *Wilcoxson* v. *Stitt* (65 Cal. 596), 310.

WARRANTY.

See INSURANCE; SALE, 68.

WATER AND WATER-COURSE.

1. **Fouling stream — joint actors — injunction.**] Where several riparian owners, acting independently, discharge refuse from their mills into a stream to the injury of a lower proprietor, an injunction may issue in a suit against all and before any action at law. *Lockwood Company* v. *Lawrence* (77 Me. 297), 768.

2. **Diverting stream from mill in another State.**] An action may be maintained in Massachusetts for diverting a stream in that State, and preventing it from coming to the plaintiff's mill in Rhode Island. *Mannville Company* v. *City of Worcester* (138 Mass. 89), 261.

3. **Ownership of land under bay on great lake.**] Land under the water of a navigable bay or harbor, on Lake Erie, may be held by private ownership, subject to the public rights of navigation and fishery, by title from an express grant made or sanctioned by the general government. *Hogg* v. *Beerman* (41 Ohio St.), 71.

4. **Surface water — diverting.**] A farm owner may not erect such barriers as will flood his neighbor's land with surface water that would otherwise escape over his own, in order to reclaim the bed of a pond that has always existed on his own land, and get rid of the inflow. *Boyd* v. *Conklin* (54 Mich. 583), 881.

WAY.

Prescription to public.] The public may not gain by prescription the right to use the land of an individual, on a navigable river, as a place of landing and of deposit of chattels for an indefinite time. *Thomas* v. *Ford* (63 Md. 346), 513.

WILL.

1. **Bequest in lieu of dower — abatement.**] A bequest in lieu of dower, accepted, is not liable to abatement. *Security Company* v. *Bryant* (52 Conn. 311), 599.

2. **Charitable bequest — evidence to explain.**] A testator bequeathed the residue of his estate "equally to the authorized agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ." *Held*, that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which the missionary societies were called by him, and the religious society with which he worshipped, his interest in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to identify the societies intended. A bequest to a missionary society, "to aid in propagating the Holy religion of Jesus Christ," is valid. *Hinckley* v. *Thatcher* (139 Mass. 477), 719.

3. **Devise — remainder — repugnancy.**] A testator devised a residuum of real estate to his wife, continuing, "But on her decease the remainder thereof I give and devise to my children," etc. *Held*, that the wife took a fee, and the remainder was void. *Mitchell* v. *Morse* (77 Me. 423), 781.

4. **—— for life — death of devisee before testator.**] A wife devised all her property to her husband for life, and provided that if he survived her,

WILL — *Continued*

the same should go at his death to her step-daughter. The husband died before the wife. *Held*, that the wife was intestate. *Gibson* v. *Seymour* (102 Ind. 485), 688.

5. **Insanity — presumptions.**] The testator is presumed to have been sane, but when habitual and fixed insanity prior to the making of the will is shown, the burden of proof is then shifted. *O'Donnell* v. *Rodiger* (76 Ala. 282), 322.

6. **Legatee — subrogation to creditors — payment out of realty.**] A legatee whose legacy has been absorbed in payment of the debts of the testator, may have it out of undivided realty by subrogation to the rights of creditors. *Hope* v. *Wilkinson* (14 Lea, 21), 149.

7. **Power to lease — perpetuity — restraint of alienation.**] A will devised property to a certain trustee and his personal representatives, to hold for the use of the testator's son during his life, and for the use of his children after his death, with power to the trustee, but not to his representatives, to lease. *Held*, that a lease for ninety-nine years, renewable forever, was not void. *Collins* v. *Foley* (66 Md. 158), 505.

8. **Reference to extraneous writing.**] A will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A., on the third page, numbered "4th," certain words describing the property devised were erased, and the words "See next page" were there interlined. On the fourth page was an unsigned clause, numbered "4th," making a bequest to A., and additional bequests to others. The draftsman testified that the erasure and interlineation and the writing on the fourth page were made by him by testator's direction, prior to the signing, and he identified the clause on the fourth page as the subject of reference on the third page. *Held*, that the clause on the fourth page was part of the will. *Baker's Appeal* (107 Penn. St. 281), 478.

9. **Provision for accountant.**] The testator in his will requested the plaintiff to keep the accounts of his executor and assist in the settlement of the estate, and provided a certain salary for him. *Held*, not a legacy, but a contract, for breach of which an action would lie. *Harker* v. *Smith* (41 Ohio St. 286), 80.

10. **Revocation by marriage — statute.**] Under a statute prescribing the modes of revoking a will, and recognizing revocation "implied by law from subsequent change in the condition or circumstances of the testator," a woman's will is revoked by her subsequent marriage. *Swan* v. *Hammond* (138 Mass. 45), 255.

11. **Trust — life estate — partnership profits.**] A will created an estate for life in the residue with remainder over. Shortly before death the testator formed a partnership, to be carried on for three years, even if he should die sooner. *Held*, that the profits went to the life-tenant as income. *Heighe* v. *Littig* (63 Md. 301), 510.

WITNESS.

See CONSTITUTIONAL LAW, 49; STATUTE, 1.

WORDS.

"**Business or vocation.**"] *See* STATUTE, 19.
"**Debt.**"] *See* STATUTE, 608.
"**Growing crops.**"] *See* CONSTITUTIONAL LAW, 305.
"**Manufacturer.**"] *See* STATUTE, 103.
"**Merchant or trader.**"] *See* STATUTE, 759.
"**Necessity.**"] *See* SUNDAY, 332.
"**Passenger.**"] *See* RAILROAD, 705.
"**Person.**"] *See* STATUTE, 242.
"**Presumptions.**"] *See* DEED, 645.


3 6105 063 241 322